Petition

81-1453

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ALEXANDER L. STEVAS,
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NO. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF SOUTH DAKOTA,

Petitioner,

v.

MASON HENRY NEVILLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

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QUESTION PRESENTED

Whether SDCL 32-23-10.1, which allows the fact of the refusal to take a test to determine the blood alcohol content of a motorist to be admitted into evidence at the subsequent trial of the motorist for driving while under the influence of alcohol, violates the Fifth Amendment privilege against self-incrimination.

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OPINIONS BELOW

The opinion of the Supreme Court of the State of South Dakota, reported at 312 N.W.2d 723 (S.D. 1981), appears in the appendix (Appendix A, pp. A1-A25).

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MASON HENRY NEVILLE,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of the State of South Dakota was entered on December 2, 1981. This court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The relevant provisions of the South Dakota Codified Laws, SDCL 32-23-10 and SDCL 32-23-10.1, are as follows:

> SDCL 32-23-10. Any person who operates any vehicle in this state shall be deemed to have given his consent to a chemical analysis of his blood, urine, breath or other bodily substance for the purpose of determining the amount of alcohol in his blood, as provided in § 32-23-7, provided that such test is administered at the direction of a law

> enforcement officer having lawfully arrested such person for a violation of § 32-23-1.
>
> Such person shall be requested by said officer to submit to such analysis and shall be advised by said officer of his right to refuse to submit to such analysis and the provisions of §§ 32-23-11 and 32-23-12 in the event of such refusal with respect to the revocation of such person's driving license.
>
> SDCL 32-23-10.1. If a person refuses to submit to chemical analysis of his blood, urine, breath or other bodily substance, as provided in § 32-23-10, and that person subsequently stands trial for driving while under the influence of alcohol or drugs, as provided in § 32-23-1, such refusal may be admissible into evidence at the trial.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Senate Bill 36 of the Fifty-fifth session of the South Dakota Legislative Assembly became law on July 1, 1980. Section 1 of that act added what is now SDCL 32-23-10.1 to the state statutes dealing with drunk drivers. SDCL 32-23-10.1 provides for the admission into evidence at a trial

for the offense of driving while under the influence of alcohol (hereinafter referred to as DWI) the fact that the driver refused to submit to a test to determine his blood alcohol content, after the test had been requested by a law enforcement officer. Hereinafter this statute will be referred to as South Dakota's "refusal as evidence" statute.

On July 19, 1980, Respondent Mason Henry Neville was arrested for DWI by Madison (South Dakota) Police Officer Jack Treloar. After being informed of his implied consent rights, as is required by SDCL 32-23-10, Respondent Neville refused to take the blood test requested of him by the law enforcement officer.

B. PROCEDURAL HISTORY

On July 19, 1980, Respondent Neville was arrested on the charge of violating SDCL 32-23-1, DWI. After a Preliminary Hearing before the Honorable Marshall Gerken, Circuit Judge for the Fourth Judicial Circuit, on August 21, 1980,

Respondent Neville was bound over to circuit court on the DWI charge.

On September 18, 1980, Respondent Neville filed a Motion to Suppress evidence with the Lake County Clerk of Courts. The evidence sought to be suppressed was Neville's refusal to submit to a blood alcohol test. The text of the Motion to Suppress appears in the Appendix (Appendix B, pp. A26-A27). This motion is the first instance at which the constitutional claims involved in this matter were raised. Respondent Neville's Motion to Suppress claimed that SDCL 32-23-10.1 was unconstitutional because it violated his Fourth, Fifth, and Sixth Amendment rights.

The hearing on Respondent Neville's Motion to Suppress was held before Judge Gerken on September 23, 1980. The Motion to Suppress was granted. The Suppression Order and related Findings of Fact and Conclusions of Law were entered by the Court on October 8, 1980, and

were filed on October 10, 1980. The text of the Findings of Fact, Conclusions of Law, and Suppression Order appears in the Appendix (Appendix C, pp. A28-A34). The court's decision to grant Respondent Neville's Motion to Suppress was based on the finding by the court that SDCL 32-23-10.1 violated Respondent Neville's Fourth, Fifth and Sixth Amendment rights.

On October 14, 1980, the State of South Dakota, through Lake County State's Attorney Wilson Kleibacker, filed a Petition for Intermediate Appeal with the Supreme Court of the State of South Dakota, seeking immediate review of the order suppressing the evidence of Respondent Neville's refusal to submit to a blood alcohol test. The text of the Petition for Intermediate Appeal, without attached Exhibits, appears in the Appendix (Appendix D, pp. A35-A40). This Petition sought review of the conclusion by the trial court

that SDCL 32-23-10.1 violated Respondent Neville's Fourth, Fifth and Sixth Amendment rights. On November 26, 1980, the State of South Dakota's petition was granted by the Supreme Court of the State of South Dakota.

On September 28, 1981, the instant matter was argued before the Supreme Court of the State of South Dakota. The decision, affirming the trial court's decision, was issued by the Supreme Court of the State of South Dakota on December 2, 1981. The text of the decision, reported at 312 N.W.2d 723 (S.D. 1981), appears in the Appendix (Appendix A, pp. A1-A25). The Supreme Court of the State of South Dakota found that Respondent Neville's Fifth Amendment privilege against self-incrimination was violated by SDCL 32-23-10.1.

REASONS FOR GRANTING THE PETITION

THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL

LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In Schmerber v. California, 384 U.S. 757 (1966), this Court held that withdrawal of blood from a defendant for chemical analysis, although compelled, does not constitute evidence of a testimonial or communicative nature. The decision further stated that the Fifth Amendment privilege against self-incrimination was not violated by the procedure. It follows that a defendant does not have a federal constitutional right to refuse to take a blood test.

In Schmerber, the petitioner had refused a police request that he take a breath test, which would determine blood alcohol content. Evidence of his refusal was admitted at trial without objection. Although Schmerber contended on appeal that the introduction of evidence relating to his refusal to submit to the breath test was a denial of his privilege against self-incrimination, this

Court refused to make a decision with regard to that contention because of Schmerber's failure to object to the introduction of the evidence during the trial. Schmerber, 384 U.S. at 765-66, n. 9.

The same issue presented to this Court in Schmerber, but which this Court declined to answer, is presented in the instant action. In State of South Dakota v. Mason Henry Neville, 312 N.W.2d 723 (S.D. 1981), the Supreme Court of the State of South Dakota found that SDCL 32-23-10.1 violated Respondent Neville's federal and state constitutional privilege against self-incrimination. Neville, supra, at 726.[1]

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[1] The South Dakota Court made no distinction between the federal and state constitutional privilege against self-incrimination. In deciding not to make a distinction, the Court, in a footnote, stated:

> In Schmerber v. California, 384 U.S. at 761-62 n. 6, 86 S.Ct. at 1831, 16 L.Ed.2d at 914, the United States Supreme Court stated (citations omitted, [] in original):
>
> Many state constitutions, including those of most of the original Colonies,

In Schmerber, this Court, although declining to decide an issue similar to that presented in this matter, offered the following guidance:

> phrase the privilege in terms of compelling a person to give "evidence" against himself. But our decision cannot turn on the Fifth Amendment's use of the word "witness." "[A]s the manifest purpose of the constitutional provisions, both of the States and of the United States, is to prohibit the compelling of testimony of a self-incriminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation . . . ." This footnote indicates that Schmerber was decided in light of the more liberal definition of "evidence" as used in our state constitution. Since the Fifth Amendment of the U.S. Constitution is broad enough to exclude this evidence, there is no need to draw a distinction at this time between S.D.Const. art. VI, § 9 and the Fifth Amendment of the U.S. Constitution.

Article VI, § 9 of the South Dakota Constitution deals specifically with self-incrimination, and states as follows:

> No person shall be compelled in any criminal case to give evidence against

This conclusion would not necessarily govern had the State tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forego the advantage of any testimonial products of administering the test--products, which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the "search," and nothing we say today should be taken as establishing the permissibility of compulsion in that case. But no such situation is presented in this case. See text at n. 13 infra.

Petitioner has raised a similar issue in this case, in connection with a police request that he submit to a "breathalyzer" test of air expelled from his lungs for alcohol content. He refused

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himself or be twice put in jeopardy for the same offense.

> the request, and evidence of his refusal was admitted in evidence without objection. He argues that the introduction of this evidence and a comment by the prosecutor in closing argument upon his refusal is ground for reversal under Griffin v. California, 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229. We think general Fifth Amendment principles, rather than the particular holding of Griffin, would be applicable in these circumstances, see Miranda v. Arizona, 384 U.S. at p. 468, note 37, 16 L.Ed.2d at p. 720, 10 A.L.R.3d 974. Since trial here was conducted after our decision in Malloy v. Hogan, supra, making those principles applicable to the States, we think petitioner's contention is foreclosed by his failure to object on this ground to the prosecutor's question and statements.

Schmerber, 384 U.S. at 765-66, n.9.

This guidance, although helpful, does not conclusively answer the question presented in this matter. Because of this lack of a concrete statement on the constitutionality of statutes similar to SDCL 32-23-10.1, each jurisdiction to consider the question is left to chart its own course in coming to a decision. It is the State of South Dakota's

contention that this area is one in which a uniform statement with regard to constitutionality should be found. Only through a decision by this Court can such uniformity be established.

Since Schmerber was decided in 1966, this Court has had an opportunity to hear at least five lower court decisions in which the constitutionality of the "refusal as evidence" concept was raised. In each case, the matter was not heard by this Court. The opportunity to clarify what has become a very muddled situation involving an important constitutional question does not exist very often; therefore, the State of South Dakota requests that this Petition for Writ of Certiorari be granted.

In People v. Sudduth, 421 P.2d 401 (Cal. 1966), the California Supreme Court held that there was no constitutional bar to evidence of and comment on a defendant's refusal to submit to a breathalyzer test for intoxication. The basis for

this decision was the California Supreme Court's companion decision to Sudduth, People v. Ellis, 421 P.2d 393 (Cal. 1966). Sudduth, supra at 403. In Ellis, Chief Justice Traynor stated:

> The privilege against self-incrimination applies to evidence of "communications or testimony" of the accused, but not to "real or physical" evidence derived from him . . . . The results of voice identification tests fall within the category of real or physical evidence . . . . In such a test, the speaker is asked, not to communicate ideas or knowledge of facts, but to engage in the physiological processes necessary to produce a series of articulated sounds, the verbal meanings of which are unimportant . . . .
>
> Even though evidence obtained from a voice identification is not within the privilege against self-incrimination, the question remains whether evidence and comment on a refusal to take such a test is admissible . . . . [The rule prohibiting comment on a defendant's refusal to testify] is not applicable when, as in this case, the defendant has no constitutional right to refuse to speak solely for purposes of voice identification . . . .
>
> Nor was defendant's refusal to "display his voice" itself a testimonial communication. It was circumstantial evidence of consciousness of guilt, and like similar

> evidence, such as escape from custody . . . false alibi . . . suppression of evidence . . . and failure to respond to accusatory statements when not in police custody . . . its admission does not violate the privilege . . . . A guilty party may prefer not to find himself in a situation where consciousness of guilt may be inferred from his conduct, but it can scarcely be contended that the police, who seek evidence from the test itself, will tend to coerce parties into refusing to take tests in order to produce this evidence . . . .
>
> Although conduct indicating consciousness of guilt is often described an an "admission by conduct," such nomenclature should not obscure the fact that guilty conduct is not a testimonial statement of guilt. It is therefore not protected by the Fifth Amendment. By acting like a guilty person, a man does not testify to his guilt but merely exposes himself to the drawing of inferences from circumstantial evidence of his state of mind.

Ellis, supra at 394-95, 397-98 (citations omitted, footnotes omitted). Review by this Court, through a Petition for Writ of Certiorari, was sought. The Petition was denied. 389 U.S. 850 (1967).

In Gay v. City of Orlando, 202 So.2d 896 (Fla. 1967), the District Court of Appeal of Florida held:

> [A] properly administered breathalyzer test occupies the same status as the blood test in Schmerber. Evidence of petitioner's refusal to submit to the test, however, is a testimonial by-product that falls within the privilege.

Gay, supra at 898. A Writ of Certiorari was sought, but was denied. 390 U.S. 956 (1968).

In State v. Dugas, 211 So.2d 285 (La. 1968), the Supreme Court of Louisiana reviewed the constitutionality of using the refusal to submit to a blood test as evidence in a D.W.I. trial. On that issue, the Louisiana Court held:

> Contrary to the contention of the defendant, we perceive no constitutional bar to the admission of such evidence. The Fifth Amendment is silent as to "compulsion which makes a suspect or accused the source of 'real or physical evidence.'" Schmerber v. State of California, supra. Since such bodily evidence violates no privilege against self-incrimination, neither does testimony of a refusal to give bodily evidence violate that privilege. Although there is authority to the contrary, the better reasoned decisions

> in other states support this principle and uphold the admissibility of testimony that defendant refused an intoximeter test.

Dugas, supra at 289. The Petition for Writ of Certiorari in this matter was not granted. 393 U.S. 1048 (1969).

Another state court decision involving an interpretation of Schmerber v. California, supra, is found in State v. Andrews, 212 N.W.2d 863 (Minn. 1973). In Andrews, the Minnesota Supreme Court stated:

> Schmerber held that the admission of the results of tests conducted on blood samples taken from an accused without his permission did not violate the accused's right not to be compelled in any criminal case to be a witness against himself. But it does not follow, as the state contends, that since an arrested motorist has no constitutional (as opposed to statutory) right to refuse to submit to chemical testing, he has no constitutional right to have evidence of that refusal excluded from evidence. Indeed, in Schmerber the court emphasized in a footnote that it was not deciding whether admission of evidence of an accused's refusal to submit to chemical testing would violate any of the accused's constitutional rights.

Andrews, supra at 864. Again the Petition for Writ of Certiorari was denied. 419 U.S. 881 (1974).

Finally, in People v. Thomas, 385 N.E.2d 584 (N.Y. 1978), the Court of Appeals of New York upheld the section of the New York Vehicle and Traffic Law which provides for the admission of evidence of a defendant's refusal to submit to a chemical test to determine the alcohol content of his blood. The court stated:

> The precise question before us is whether testimony may be admitted to establish that in fact this defendant refused to take the blood test, an issue expressly left open in Schmerber because it had not been preserved for review in that case . . . .
>
> Several courts which have confronted the issue have held that, inasmuch as the defendant has no constitutional right to refuse to take the test, the privilege against self-incrimination is not applicable.
>
> We think the rationale should be stated more broadly. Although the evidence of the defendant's refusal to take the test be classified as communicative or testimonial (and in our view it is immaterial for present purposes whether the

particular proof introduced is in the form of a witness' description of the defendant's physical behavior in refusing to submit to the test or of testimony by the witness as to the defendant's oral or written statement refusing to do so), it should be admissible so long as the defendant was under no compulsion of any sort to refuse to take the test . . . .

Before making his determination as to which course to follow, defendant was informed, as the statute required that he be, "in clear and unequivocal language" of the effect of a refusal. The choice whether to take the test or to refuse was entirely his, as the statute makes clear . . . . In being presented with the choice defendant was confronted with no impairment of any right enjoyed by him, for he had no constitutional privilege not to submit to the chemical test and the statutory right not to take the test conferred by the Vehicle and Traffic Law was qualified by express provision for admissibility of proof of refusal in a prosecution of the type now before us . . . .

We conclude that the evidence of defendant's persistent refusal to take the test was properly admitted, that the jury was correctly charged that it could consider such evidence, and that subdivision 4 of section 1194 of the Vehicle and Traffic Law is not violative of a defendant's rights under either Federal or New York State Constitution.

Thomas, supra at 587-589 (citations and footnotes omitted).

This Court dismissed the appeal to the Supreme Court in Thomas for want of a substantial federal question. However, two justices of this Court dissented from the decision to dismiss, stating:

> At issue in this appeal is whether admission into evidence of one's refusal to submit to a blood test to determine inebriation is contrary to the Fifth Amendment's prohibition of compelled testimonial incrimination . . . .
>
> Because of this conflict among state courts as to the reach of the Fifth Amendment's protection against compelled testimonial evidence, I dissent from the Court's decision to dismiss this appeal.

Thomas v. New York, 444 U.S. 891 (1979). The State of South Dakota heartily agrees with that statement. Each of the cases cited above dealt with the same issue: whether a refusal to submit to a chemical test to determine blood alcohol content of a drunk driver is admissible evidence.

While these cases involved such questions as whether the driver had a "right" to refuse the test or whether a statutory provision dealt with the subject, each had the same federal constitutional issue involved. Yet, while each of these state courts reached a conclusion on the issue, using Schmerber v. California as a guide, incredibly none of the decisions used the same logic to reach its conclusion. In fact, conflicting conclusions were reached as to whether this type of evidence is permissible. The State of South Dakota submits that this issue is one that must be decided by this Court, so that this incomprehensible inconsistency among the jurisdictions can be eliminated. This is especially true, when one realizes that this inconsistency has come about, to some extent, because of the ambiguous guidelines delivered by this Court in Schmerber v. California.

To further buttress its contention that the inconsistency among the jurisdictions is so widespread that a decision is required by this Court,

the State of South Dakota directs this Court's attention to the following information. The following state and federal court decisions allow the admission into evidence of the refusal to submit to a chemical test to determine the blood alcohol content of a defendant, whether on statutory or constitutional grounds:

Hill v. State, 366 So.2d 318 (Ala. 1979);

Campbell v. Superior Court, 479 P.2d 685 (Ariz. 1971);

People v. Sudduth, 421 P.2d 401 (Cal. 1966), cert. denied, 389 U.S. 850 (1967);

State v. Lynch, 274 A.2d 443 (Del. 1971);

State v. Duke, 378 So.2d 96 (Fla. 1979);

State v. Bock, 328 P.2d 1065 (Idaho 1958);

State v. Holt, 156 N.W.2d 884 (Iowa 1968);

State v. Dugas, 211 So.2d 285 (La. 1968) cert. denied, 393 U.S. 1048 (1969);

People v. Taylor, 250 N.W.2d 570 (Mich. 1977);

State v. Meints, 202 N.W.2d 202 (Neb. 1972);

State v. Tabisz, 322 A.2d 453 (N.J. 1974);

People v. Thomas, 385 N.E.2d 584 (N.Y. 1978), appeal dismissed 444 U.S. 891 (1979);

State v. Flannery, 230 S.E.2d 604 (N.C. 1976);

City of Westerville v. Cunningham, 239 N.E.2d 40 (Ohio 1968);

State v. Gardner, 629 P.2d 412 (Ore. 1981);

Commonwealth v. Dougherty, 343 A.2d 730 (Pa. 1978);

State v. Miller, 185 S.E.2d 359 (S.C. 1971);

State v. Welch, 394 A.2d 1115 (Vt. 1978);

State v. Albright, 298 N.W.2d 196 (Wis. 1980); and

Welch v. District Court of Vermont Unit No. 5, Washington County, 461 F.Supp. 592 (D. Vermont 1978); aff'd 594 F.2d 903 (2nd Cir. 1979).

The following state court decisions do not allow for the admission of such evidence, whether on statutory or constitutional grounds:

Puller v. Municipality of Anchorage, 574 P.2d 1285 (Ala. 1978);

State v. Anonymous, 276 A.2d 452 (Conn. 1971);

Stuart v. District of Columbia, 157 A.2d 294 (D.C. 1960);

Johnson v. State, 188 S.E.2d 416 (Ga. 1972);

People v. Boyd, 309 N.E.2d 29 (Ill. 1974);

State v. Gillis, 199 A.2d 192 (Me. 1964);

Davis v. State, 259 A.2d 567 (Md. 1969);

Commonwealth v. Scott, 269 N.E.2d 454 (Mass. 1971);

State v. Andrews, 212 N.W.2d 863 (Minn. 1973), cert. denied, 419 U.S. 881 (1974);

City of St. Joseph v. Johnson, 539 S.W.2d 784 (Mo. 1976);

Allen v. State, 525 P.2d 1386 (Okla. 1974);

State v. Neville, 312 N.W.2d 723 (S.D. 1981);

Crawley v. State, 413 S.W.2d 370 (Tenn. 1967);

Dudley v. State, 548 S.W.2d 706 (Tex. 1977);

State v. Parker, 558 P.2d 1361 (Wash. 1976); and

State v. Adams, 247 S.E.2d 475 (W.Va. 1978).

The purpose of these listings is not to show which positon has the greater number of adherents. Rather, the purpose is to show the conflict between the jurisdictions on the question of whether "refusal as evidence" is constitutionally permissible. The conflict is further heightened when one realizes that within each of the two lists only a very few state courts agree on the proper method of analysis of the question.

South Dakota, with the statute involved in this matter, SDCL 32-23-10.1, is not the only state to have a statute dealing with the admissibility into evidence of the fact of refusal to

submit to a chemical test of the blood. Several other states have statutes allowing for the admissibility of the refusal. The following states are representatives of this group:

Alabama (C.A.A., 1980 Supp. § 32-5A-194(c));

Arizona (A.R.S. § 28-692(H));

Delaware (21 Del.C. § 2749);

Iowa (I.C.A. § 321B.11);

Louisiana (L.S.A. - R.S. § 32:666);

New York (Veh. and Traffic Law § 1194, subd. 4);

North Dakota (N.D.C.C. § 39-20-08);

Oregon (O.R.S. § 487.805(2)); and

Vermont (23 V.S.A. § 1205(a)).

The following states, on the other hand, have specific statutes prohibiting the use of the refusal as evidence:

Colorado (C.R.S. 42-4-1202(3)(h));

Illinois (S.D.A. ch. 95 1/2, § 11-501(h));

Maine (R.S. 1954, c. 22 § 150);

Maryland (An. Code 1980, C.J. § 10-309(a)); and

Massachusetts (G.L. c. 90, § 24(i)(e)).

The sole purpose of this listing of statutes again is to show the conflict between jurisdictions with respect to the admissibility of the refusal as evidence. The constitutionality of many of these statutes has been decided in the appropriate state courts, and many of the decisions have reviewed the statutes with respect to Fifth Amendment standards. Statutes that are exactly opposite in effect have been reviewed in light of the same federal constitutional provision and both types of statutes have been uphald. This occurrence creates a great deal of confusion as to the proper analysis of this problem. It is all the more confusing when one considers the attempt in recent years to create a consistent approach to an individual's constitutional rights. The time is right to finally answer the question left unanswered by Schmerber v. California.

To further highlight the confusion that exists in this area of the law, the State of South Dakota respectfully directs the Court's attention to only some of the state and federal court decisions issued since the Court of Appeals of New York decided People v. Thomas, supra on December 7, 1978, the last decision dealing with the instant issue to seek review in this Court. In Hill v. State, 366 So.2d 318 (Ala. 1979), decided January 12, 1979, the Supreme Court of Alabama concluded that the refusal to submit is probative on the question as to whether the driver was intoxicated at the time of his arrest. Hill, supra at 320. After reviewing the limited guidelines found in the Schmerber decision, the Alabama court held that:

> [T]he refusal to submit to a chemical test for intoxication is not a compelled testimonial communication and the admission of evidence of refusal and comment thereon does not violate the accused's privilege against self-incrimination.

Hill, supra at 325.

The United States Court of Appeals for the Second Circuit decided Welch v. District Court of Vermont Unit No. 5, Washington County, 594 F.2d 903 (2nd Cir. 1979), on March 15, 1979. Like the Alabama Court in Hill, the Second Circuit Court of Appeals evaluated the question of the constitutionality of "refusal as evidence" in relation to a state statute providing for the admissibility of such evidence. Also, like the Hill court, the Court of Appeals began its review of the question by examining this Court's decision in Schmerber v. California. The court concluded that:

> [T]here is nothing unconstitutional in the manner in which Vermont has chosen to condition its statutory right to refuse. The statute does not compel a driver refusing to take the test to surrender any constitutional right. It is merely an explicit recognition of the practical existence of situations that might develop where a driver simply will not cooperate even though required to by state law, such as resort by the police to force in an effort to obtain the physical evidence to which they are entitled.

Welch, supra at 905.

State v. Duke, 378 So.2d 96 (Fla. 1979), decided on December 28, 1979, by the District Court of Appeal of Florida, also upheld the constitutionality of using the refusal to submit as evidence. Duke, supra at 97. The Florida court then discussed the concepts of "consent" and "withdrawal of implied consent." The discussion provides much of the reasoning used by the court in deciding that the refusal is valid evidence. The statute reviewed in Duke is similar to SDCL 32-23-10. The court stated:

> The statute should be construed to evidence legislative recognition of consent under the first portion of the statute as being a legal fiction. A driver retains the physical power to refuse a sobriety test but not the legal right to withdraw his implied consent. The physical power/legal right interpretation would not affect the results in either Riggins or McDonald since these cases involved improper police conduct in the taking of the sobriety tests over the objections of the offending drivers.
>
> Police policy considerations favor the physical power/legal right distinction. If Section 322.261(1)(1) is concluded not to be compulsory, the driver who

> refused the test is penalized only by the suspension of his license for three months. However, the driver who takes the test faces a greater penalty as the results could be evidence against him at trial. This noncompulsory interpretation would lead to drivers not taking the test.
>
> The physical power/legal right dichotomy was recognized by the Arizona Suprme Court in Campbell v. Superior Court, 196 Ariz. 542, 479 P.2d 685 (1971). The Arizona statute is similar to Florida's statute with two exceptions. First, the Arizona statute expressly provides that if a person under arrest refuses a sobriety test, then "none shall be given." Second, the statute expressly provides that refusal to submit is admissible. The Arizona Supreme Court found this statute did not give the driver a legal right to refuse a sobriety test; it merely evidenced legislative recognition that he had a physical power to refuse to submit. The court found the reason for the provision prohibiting the taking of a sobriety test over the objection of an offending driver was to avoid violence which often attended forcible tests upon "recalcitrant inebriates."

Duke, supra at 98 (emphasis in original).

On September 8, 1980, the Court of Appeals of Wisconsin released its decision in State v. Albright, 298 N.W.2d 196 (Wis. 1980). In that

decision, the use of the refusal as evidence was found to be constitutionally permissible. The Wisconsin court stated:

> [W]e note that use of test refusal evidence for the purpose of showing consciousness of guilt is constitutionally permissible. The only rationale for a rule prohibiting comment on a refusal would be that there is a right to refuse the test. Wisconsin drivers have no constitutional right to refuse to take the breathalyzer. There is no self-incrimination within the protections of the Fifth Amendment of the United States Constitution, or article I, sec. 8 of the Wisconsin Constitution. These provisions protect against compulsion to testify against oneself. The evidence obtained by a breathalyzer test, though incriminating, is not testimony or evidence relating to a communicative act.

Albright, supra at 200 (footnotes omitted).

In State v. Gardner, 629 P.2d 412 (Ore. 1981), the Court of Appeals of Oregon was faced with the question of whether the refusal was a constitutionally valid piece of evidence in a D.W.I. trial. Oregon has a "refusal as evidence" statute similar to SDCL 32-23-10... The court, in a decision issued on June 8, 1981, stated:

> The Fifth Amendment privilege against self-incrimination only protects an accused "from being compelled to testify against [herself], or otherwise provide the state with evidence of a testimonial or communicative nature ***." Schmerber v. California, 384 U.S. 757, 761, 86 S.Ct. 1826, 1830, 16 L.Ed.2d 908 (1966). In Schmerber, the court concluded that the withdrawal of blood over the defendant's objection and the use of its analysis at trial did not violate the accused's Fifth Amendment rights. As the court stated, the blood test evidence "was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner ***." Id., at 765, 86 S.Ct. at 1832. The same conclusions apply to breathalyzer evidence.
>
> Because a person's breath constitutes real or physical evidence rather than testimonial or communicative evidence, a person under arrest has no constitutional right to refuse to take a breath test. Welch v. District Court of Vermont, Unit, Etc., 594 F.2d 903, 904 (2nd Cir. 1979). On that basis, the majority of courts considering the issue have concluded that the introduction of evidence of a defendant's refusal to take a sobriety test in the form of a blood or breath test does not violate his or her right against self-incrimination.

Gardner, supra at 416 (citations omitted).

Finally, in State v. Neville, 312 N.W.2d 723 (S.D. 1981), decided on December 2, 1981, the Supreme Court of the State of South Dakota spent a great deal of its decision reviewing the effect of both Schmerber v. California, supra and Miranda v. Arizona, 384 U.S. 436 (1966), on the "refusal as evidence" issue. Noting that the Schmerber decision failed to answer the question, the South Dakota Court concluded:

> The inference of inability to pass the blood test is not similar to circumstantial evidence of consciousness of guilt such as escape from custody, false alibi, flight or suppression of evidence as was held by the California Supreme Court in People v. Sudduth, 65 Cal.2d 543, 55 Cal.Rptr. 393, 421 P.2d 401 (1966). A defendant is not exercising a statutory right in those instances, whereas here there is an absolute right under South Dakota law to refuse to submit to the blood test. SDCL 32-23-10; State v. Oswald, 241 N.W.2d 566 (S.D. 1976); State v. Buckingham, 240 N.W.2d 84 (S.D. 1976). Thus, a defendant's actions, rather than being evidence of consciousness of guilt, may be the result of the exercise of his statutory right to refuse the test. A defendant's exercise of his statutory right to refuse to submit to the blood test cannot be used against him in the

> prosecution's case in chief. See Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); Dudley v. State, supra (P.J. Onion, concurring.)

Neville, supra at 726. Based on this holding, SDCL 32-23-10.1 was found to violate an accused's federal and state privilege against self-incrimination. Neville, supra at 726.

The dissent filed in Neville by Chief Justice Wollman further exemplifies the confusion in the "refusal as evidence" area created by the lack of a definitive decision by this Court on the subject. In the dissent, two alternate types of reasoning are used. First, the dissent urges that admission of the fact of a defendant's refusal to submit to a chemical test for intoxication does not violate the privilege against self-incrimination. In support of the proposition, the dissent cites People v. Ellis, supra, People v. Sudduth, supra and their progeny. Neville, supra at 727-28. Alternatively, the dissent urges that the State Legislature which created the statutory right to refuse to take a

chemical test, may place a condition on a refusal, such as use of the refusal as evidence. This position is consistent with Vermont Supreme Court's decision in State v. Brean, 385 A.2d 1085 (Vt. 1978). Neville, supra at 778-79.

Again, the purpose of this review of the recent decisions dealing with the use of the refusal as evidence is not to show the merits of a particular argument, even though the "weight of authority" supports the ultimate result sought by the State of South Dakota. The purpose is rather to show the great diversity that still exists in the analyses used by the various courts to determine the validity of the use of the fact of a driver's refusal to submit to a analysis as evidence in his subsequent D.W.I. trial. The bottom line to the entire argument set forth by the State of South Dakota in this Petition is that the issue presented in this matter, which deals with the application of a federal constitutional

right to the relatively frequent occurrence of D.W.I. arrests followed by implied consent blood testing, is one that must be decided by this Court.

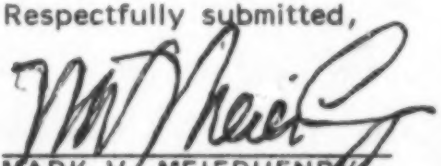
As has been stated before, the need for a decision by this Court on this issue is primarily based on the necessity to clean up a very confusing quagmire of court decisions and state statutes on the subject. The State of South Dakota argues that a decision from this Court is needed now to give guidance in an area where there is none. This is especially true now that many of the states and the Federal government have begun a more intensive war on drunk drivers. If "refusal as evidence" is constitutionally permissible, it could be a very important piece of ammunition in that war. The use of the fact of the refusal to submit to the blood or breath test is either constitutionally permissible

or unconstitutional as a deprivation of an accused's privilege against self-incrimination. The holding must be consistent throughout the country, especially when any decision as to the constitutionality of statutes similar to SDCL 32-23-10.1 is based on the Fifth Amendment to the United States Constitution. The State of South Dakota submits that it is now time to answer the question raised but not answered in footnote 9 of Schmerber v. California.

CONCLUSION

Based on the foregoing arguments and authorities, the State of South Dakota prays that its Petition for Writ of Certiorari to the Supreme Court of the State of South Dakota be granted.

Respectfully submitted,



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Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three copies of the Petition for a Writ of Certiorari to the Supreme Court of the State of South Dakota in the case of State of South Dakota v. Mason Henry Neville, was served by United States mail, first class, postage prepaid, upon Mr. David R. Gienapp, Arneson, Issenhuth & Gienapp, Post Office Box 28, Madison, South Dakota 57042, on this 1st day of February, 1982.

MARK V. MEIERHENRY
ATTORNEY GENERAL

Appendix

APPENDIX A

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

MASON HENRY NEVILLE,

Defendant and Appellee.

NO. 13260

Argued September 28, 1981

Decided December 2, 1981

DUNN, Justice.

The State appeals from an order of the circuit court suppressing evidence of defendant Mason Henry Neville's refusal to submit to a blood alcohol test. We affirm.

Neville was arrested for driving while intoxicated on July 19, 1980, after he had drawn the attention of two Madison, South Dakota police officers by failing to stop for a stop sign. Neville was given two field sobriety tests and was then arrested. After advising him of his Miranda

rights, the arresting officer asked Neville to submit to a blood alcohol test and warned him that his failure or refusal to submit to the test may result in the revocation of his driver's license. Neville refused to submit to the blood test, and subsequently made a motion to suppress any and all evidence of his refusal. At the suppression hearing, prosecution witnesses testified to his refusal and to his statement "I'm too drunk, I won't pass the test." The circuit court ordered the evidence of Neville's refusal to submit to the blood alcohol test suppressed, finding that SDCL 32-23-10.1 was unconstitutional; that the arresting officers failed to advise Neville that the refusal evidence could be used against him at trial; and that the refusal was irrelevant to the issues before this court.

The statute in question, SDCL 32-23-10.1, provides that:

> If a person refuses to submit to chemical analysis of his blood, urine, breath or other bodily substance, as provided

> in § 32-23-10, and that person subsequently stands trial for driving while under the influence of alcohol or drugs, as provided in § 32-23-1, such refusal may be admissible into evidence at the trial.

Prior to the enactment of this statute in 1980, this court held that SDCL 32-23-10 conferred on a defendant a statutory right to refuse to submit to an alcohol analysis test and that evidence of a defendant's refusal would not be admissible in a criminal proceeding. State v. Oswald, 90 S.D. 342, 241 N.W.2d 566 (1976); State v. Buckingham, 90 S.D. 198, 240 N.W.2d 84 (1976). In State v. Oswald, supra, we stated: "Certainly it is unfair to create by statute a right not to submit to a chemical test and to allow the accused to exercise that right and then in open court before a jury to permit testimony concerning refusal which can all too easily work in the minds of the jury members to the prejudice of the defendant." 90 S.D. at 346, 241 N.W.2d at 569. To reach this conclusion, we relied on State v. Buckingham, supra,

wherein we stated: "Implicit in our implied consent statute, however, is the right to refuse to submit to a test and, a fortiori, the requirement that a choice be made between submitting to the test or suffering the consequences of such refusal." 90 S.D. at 204, 240 N.W.2d at 87.

At the time Oswald and Buckingham were decided by this court the applicable statute, while providing that the individual had a right to refuse to take the test, did not expressly state that such a refusal would be admissible in evidence in a criminal proceeding as does SDCL 32-23-10.1. Therefore, the question before us today is whether SDCL 32-23-10.1 is a violation of Neville's federal and state constitutional privilege against self-incrimination. U.S. Const. Amend. V; S.D. Const. art. VI, § 9. We find that it is.

All presumptions are in favor of the constitutionality of a statute until the contrary is shown beyond a reasonable doubt. State v. Brown, 296 N.W.2d 501 (S.D. 1980); Crowley v.

State, 268 N.W.2d 616 (S.D. 1978); State v. Strong, 90 S.D. 652, 245 N.W.2d 277 (S.D. 1976). This presumption results in a heavy burden being placed on the assailant. State v. Brown, supra; State Theatre Co. v. Smith, 276 N.W.2d 259 (S.D. 1979).

In Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the United States Supreme Court held that withdrawal of blood from a defendant for chemical analysis, although compelled, does not constitute evidence of a testimonial or communicative nature. The Court further held that the Fifth Amendment privilege against self-incrimination was not violated by the procedure. It can be implied that a defendant does not have a federal constitutional right to refuse to take a blood test.

The Supreme Court, however, expressly declined in Schmerber to decide the question now before us. In Schmerber the petitioner had refused a police request that he take a breath

test for alcohol content. Evidence of his refusal was admitted at trial without objection. He contended on appeal that the introduction of evidence relating to his refusal to submit to the breath test was a denial of his privilege against self-incrimination. The Court did not reach this question, since petitioner failed to object to the introduction of the evidence at trial. However, it did indicate in a footnote that incriminating evidence resulting from the refusal to submit to an alcohol test may be "an unavoidable by-product of the compulsion to take the test . . . . If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any testimonial products of administering the test--products which would fall within the privilege." The Court then stated that "general Fifth Amendment principles" would be applicable to the introduction of refusal evidence and comments made by the prosecutor in closing argument upon his refusal. 384 U.S. at

765-66 n.9, 86 S.Ct. at 1833, 16 L.Ed.2d at 916-17 (emphasis in original).

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Court summarized its discussion of the Fifth Amendment privilege against self-incrimination as follows:

> To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' to repsect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.

384 U.S. at 460, 86 S.Ct. at 1620, 16 L.Ed.2d at 715 (citations omitted). The Court reaffirmed this statement in Schmerber noting that "the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications[.]" The Court recognized, however, that "the privilege is a bar against compelling 'communications' or 'testimony,' but

that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." 384 U.S. at 763-64, 86 S.Ct. at 1832, 16 L.Ed.2d at 916.

To determine whether the Fifth Amendment privilege against self-incrimination applies to refusal evidence, this court must first examine whether a defendant's refusal to take a chemical analysis test is a communicative act involving that person's testimonial capacities or if it is real or physical evidence which does not fall within the privilege. Evidence of a defendant's refusal to submit to a blood test is relevant only because it infers that defendant refused to take the blood test because of his fear as to whether he would pass it. Dudley v. State, 548 S.W.2d 706 (Tex. Crim. App. 1977). A defendant's silence or refusal to submit to a requested blood test is a tacit or overt expression and communication of defendant's thoughts. Dudley v. State, supra. To this extent the evidence may be characterized

as "communicative or testimonial" rather than "real or physical" evidence that simply describes an existing physical characteristic. People v. Thomas, 46 N.Y.2d 100, 412 N.Y.S.2d 845, 385 N.E.2d 584 (1978); Gay v. City of Orlando, 202 So.2d 896 (Fla. 1967), cert. denied, 390 U.S. 956 (1968).

The inference of inability to pass the blood test is not similar to circumstantial evidence of consciousness of guilt such as escape from custody, false alibi, flight or suppression of evidence as was held by the California Supreme Court in People v. Sudduth, 65 Cal.2d 543, 55 Cal.Rptr. 393, 421 P.2d 401 (1966). A defendant is not exercising a statutory right in those instances, whereas here there is an absolute right under South Dakota law to refuse to submit to the blood test. SDCL 32-23-10; State v. Oswald, supra; State v. Buckingham, supra. Thus, a defendant's actions, rather than being evidence of consciousness of guilt, may be the result of the

exercise of his statutory right to refuse the test. A defendant's exercise of his statutory right to refuse to submit to the blood test cannot be used against him in the prosecution's case in chief. See Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); Dudley v. State, supra, (P.J. Onion, concurring).

Second, this court must determine whether this testimonial evidence was compelled for purposes of applying the Fifth Amendment standard. We agree with the rationale of the Minnesota Supreme Court in State v. Andrews, 212 N.W.2d 863, 864 (Minn. 1973), wherein it stated:

> "In one sense the testimonial action is obviously not compelled--the state is not ordering the suspect to refuse cooperation. But the state does compel a suspect to choose between submitting to a perhaps unpleasant examination and producing testimonial evidence against himself. The suspect's option to submit to a lawfully imposed burden instead of implicity testifying against himself does not necessarily save the procedure: lifting a lawful burden--the examination--is in effect an inducement that casts doubt on the 'voluntariness' of the testimonial evidence thereby obtained."

Quoting from Note, Constitutional Limitations on the Taking of Body Evidence, 78 Yale L.J. 1074, 1084 (1969) (emphasis in original). See also, People v. Rodriguez, 80 Misc.2d 1060, 364 N.Y.S.2d 786 (1975).

We hold that evidence of an accused's refusal to take a blood test violates the federal and state privilege against self-incrimination and therefore SDCL 32-23-10.1 is unconstitutional.* To the extent that our decision in State v. Maher, 272 N.W.2d 797 (S.D. 1978) expresses views contrary to those expressed herein with respect to the

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* In Schmerber v. California, 384 U.S. at 761-62 n. 6, 86 S.Ct. at 1831-32, 16 L.Ed.2d at 914, the United States Supreme Court stated (citations omitted, [ ] in original):

> Many state constitutions, including those of most of the original Colonies, phrase the privilege in terms of compelling a person to give 'evidence' against himself. But our decision cannot turn on the Fifth Amendment's use of the word "witness." '[A]s the manifest purpose of the constitutional provisions, both of the States and of the United States, is to prohibit the

finding that defendant's refusal to submit to the test was non-testimonial evidence and therefore not protected by the Fifth Amendment, we overrule that decision.

The State also contends that Neville's statement "I'm too drunk, I won't pass the test," made after his arrest and after being advised of his Miranda rights to the police officers, is admissible into evidence. This incriminating statement is "an unavoidable by-product of the compulsion to

---

> compelling of testimony of a self-incriminating kind from a party of a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation . . . .'

This footnote indicates that Schmerber was decided in light of the more liberal definition of "evidence" as used in our state constitution. Since the Fifth Amendment of the U.S. Constitution is broad enough to exclude this evidence, there is no need to draw a distinction at this time between S.D. Const. Art. VI, § 9 and the Fifth Amendment of the U.S. Constitution.

take the test" and the United States Supreme Court has held that "general Fifth Amendment principles . . . would be applicable in these circumstances." Schmerber v. State of Clifornia, 384 U.S. at 765-66 n. 9, 86 S.Ct. 1833, 16 L.Ed.2d at 916-17.

In Miranda v. Arizona, supra, the United States Court held that a person subjected to custodial interrogation must be warned that he has a right to remain silent, that any statement he does make can be used in evidence against him, and that he has the right to the presence of an attorney, either retained or appointed. The Court further acknowledged that a defendant may waive these rights, but only if the waiver is made voluntarily, knowlingly and intelligently will it render subsequent confessions admissible.

This court has held that in making the determination with respect to whether there was a voluntary waiver of a defendant's Fifth Amendment rights, the totality of the circumstances

surrounding the interrogation must be examined. Fare v. Michael C., 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979); State v. Cowell, 288 N.W.2d 322 (S.D. 1980). Custodial statements made by an intoxicated defendant are not per se involuntary, but rather this is one of the circumstances. U.S. v. Brown, 535 F.2d 424 (8th Cir. 1976). The trial judge must make the decision regarding voluntariness of the statement in the first instance. State v. Cowell, supra; State v. Stumes, 90 S.D. 382, 241 N.W.2d 587 (1976); State v. Adkins, 88 S.D. 571, 225 N.W.2d 598 (1975).

This matter arose on a motion to suppress which required a finding of voluntariness by the trial judge in accordance with State v. Stumes, supra, with findings of fact and conclusions of law entered. There was no question of hearing the question of voluntariness in the presence of the jury as in State v. Lufkins, 309 N.W.2d 331 (S.D. 1981).

In the case before us, the circuit court did not enter findings of fact or conclusions of law regarding the voluntariness of Neville's statement. Therefore, we remand for a finding on this issue.

In light of our holding that SDCL 32-23-10.1 is unconstitutional as a denial of Neville's constitutional privilege against self-incrimination, we need not address the other issues raised on appeal or deem them to be without merit.

We affirm the order of the circuit court suppressing the admission of refusal evidence and remand for further proceedings not inconsistent with this holding with regard to the suppression of Neville's statement.

MORGAN, HENDERSON and FOSHEIM, JJ. concur.

WOLLMAN, C. J. dissents.

WOLLMAN, Chief Justice (dissenting).

Because I am persuaded by the logic of those decisions holding that admission of the fact of a defendant's refusal to submit to a chemical test for intoxication is not violative of the privilege against self-incrimination, I cannot agree that SDCL 32-23-10.1 is unconstitutional.

The seminal case for upholding the introduction of such evidence is People v. Ellis, 55 Cal. Rptr. 385, 421 P.2d 393 (1966). In holding that introduction of evidence of a defendant's refusal to participate in a voice identification test did not constitute a violation of the defendant's constitutional privilege against self-incrimination, Chief Justice Traynor wrote:

> The privilege against self-incrimination applies to evidence of "communications or testimony" of the accused, but not to "real or physical" evidence derived from him . . . . The result of voice identification tests fall within the category of real or physical evidence . . . . In such a test, the speaker is asked, not to communicate ideas or knowledge of facts, but to engage in the physiological processes necessary to

produce a series of articulated sounds, the verbal meanings of which are unimportant . . . .

Even though evidence obtained from a voice identification is not within the privilege against self-incrimination, the question remains whether evidence and comment on a refusal to take such a test is admissible . . . . [The rule prohibiting comment on a defendant's refusal to testify] is not applicable when, as in this case, the defendant has no constitutional right to refuse to speak solely for purposes of voice identification.

Nor was defendant's refusal to "display his voice" itself a testimonial communication. It was circumstantial evidence of consciousness of guilt, and like similar evidence, such as escape from custody . . . false alibi . . . flight . . . suppression of evidence . . . and failure to respond to accusatory statements when not in police custody . . . its admission does not violate the privilege . . . . A guilty party may prefer not to find himself in a situation where consciousness of guilt may be interred from his conduct, but it can scarcely be contended that the police, who seek evidence from the test itself, will tend to coerce parties into refusing to take tests in order to produce this evidence . . . .

Although conduct indicating consciousness of guilt is often described as an "admission by conduct," such nomenclature should not boscure the fact that

> guilty conduct is not a testimonial statement of guilt. It is therefore not protected by the Fifth Amendment. By acting like a guilty person, a man does not testify to his guilty but merely exposes himself to the drawing of inferences from circumstantial evidence of his state of mind.

55 Cal.Rptr. 385, 386-87, 421 P.2d 393, 394-95, 397-98 (citations omitted, footnotes omiited).

In a companion case decided the same day, the California Supreme Court applied the reasoning in the Ellis case in holding that there was no constitutional bar to evidence of and comment on a defendant's refusal to submit to a breathalyzer test for intoxication. People v. Sudduth, 55 Cal. Rptr. 393, 421 P.2d 401 (1967).

Other jurisdictions that have followed the reasoning in the Ellis and Sudduth cases include Alabama (Hill v. State, 366 So.2d 318 (Ala. 1979)); Arizona (Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971)); Nebraska (State v. Meints, 189 Neb. 264, 202 N.W.2d 202 (1971)); New York (People v. Thomas, 46 N.Y.2d 100, 412

N.Y.D.2d 845, 385 N.E.2d 584 (1978), appeal dismissed, 444 U.S. 891, 100 S.Ct. 197, 62 L.Ed.2d 127 (1979)); Ohio (City of Westerville v. Cunningham, 15 Ohio St.2d 121, 239 N.E.2d 40 (1968)); and Pennsylvania (Commonwealth v. Robinson, 229 Pa.Super. 131, 324 A.2d 441 (1974)). See also State v. Holt, 261 Iowa 1089, 156 N.W.2d 884 (1968). I would follow these decisions and hold that the trial court erred in ruling that SDCL 32-23-10.1 is unconstitutional.

As an alternative holding, I would follow the reasoning of the Supreme Court of Vermont as expressed in the case of State v. Brean, 136 Vt. 147, 385 A.2d 1085 (1978):

> The right to refuse to submit to a blood or breath test in Vermont is a creature of statute, 23 V.S.A. § 1205, and not the Federal or State Constitutions. Since the Vermont Legislature has deemed fit to grant suspected intoxicated drivers more "protection" than is constitutionally required, the proper question is not, as defendant suggests, whether refusal evidence is testimonial or communicative in nature and thereby protected by the cloak of the Fifth Amendment, but rather whether the

> Legislature possesses the power to place a condition upon the grant of a statutory right. We think it eminently clear that it does. Since the right to refuse to submit to the test is a matter of legislative grace or privilege . . . the Legislature may properly condition the exercise of that right by providing that any refusal may be introduced as evidence in a criminal proceeding . . . .

385 A.2d at 1088 (citation omitted).

In distinguishing earlier decisions that had held that evidence of refusal to take a blood test could not be used against a defendant in a criminal proceeding, the Vermont Court pointed out that the state legislature had amended the state's implied consent statute to provide for the admission in evidence of a defendant's refusal to submit to a chemical test for intoxication:

> Under the present statute, however, the motorist's refusal right is not absolute, but has been made expressly conditional--a change that is manifestly within the prerogative of the Legislature.
>
> We hold that the admission of refusal evidence, as expressly authorized by 23 V.S.A. § 1205(a), does not violate defendant's privilege against self-incrimination; accordingly, there was no

> deprivation of defendant's due process rights.

385 A.2d at 1088.

The situation that faced the Supreme Court of Vermont parallels the situation in this state. As pointed out in the majority opinion, we held in State v. Oswald, 90 S.D. 342, 241 N.W.2d 566 (1976), that:

> We have a South Dakota statute which grants an absolute right to an arrested person to refuse to submit to testing to determine the alcoholic content of his or her blood, albeit not without certain consequences. But the consequences of such refusal are provided by statute and they nowhere include the admissibility of evidence of such refusal in court on DWI charge . . . .

90 S.D. at 348, 241 N.W.2d at 570.

As we said in State v. Buckingham, 90 S.D. 198, 204, 240 N.W.2d 84, 87 (1976), "Implicit in our implied consent statute, however, is the right to refuse to submit to a test and, a fortiori, the requirement that a choice be made between submitting to the test or suffering the consequences of such refusal." One of the consequences of

such refusal is to make the fact of such refusal admissible in evidence at the subsequent trial.* To that extent, then, there is no "absolute right" under state law to refuse to submit to a chemical test, if by that term it is argued that no adverse consequences may flow from the exercise of such right. Indeed, in view of the fact that one of the consequences of the refusal to submit to a chemical test is the revocation of one's driver's license, it is a contradiction in terms to characterize the right of refusal as "absolute." Accordingly, it is hardly realistic to say that a

---

* As a counterpart of SDCL 32-23-10.1, the legislature, by 1980 S.D. Sess. Laws ch. 230, § 2 (SDCL 19-13-28.1), provided that:

> Notwithstanding the provisions of § 19-13-28, when a person stands trial for driving while under the influence of alcohol or drugs, as provided under § 32-23-1, and that person has refused chemical analysis, as provided in § 32-23-10, such refusal is admissible into evidence. Such person may not claim privilege against self-incrimination with regard to admission of refusal to submit to chemical analysis.

defendant's refusal to submit to a chemical test may be the exercise of his statutory right to refuse the test rather than manifestation of consciousness of guilt. While the former may in a rare case be true, the latter is the far more likely situation.

I would adhere to the views expressed in State v. Maher, 272 N.W.2d 797 (S.D. 1978), and hold that the introduction of evidence of refusal to submit to a chemical test for intoxication does not violate a defendant's rights under either the United States Constitution or the South Dakota Constitution. Accordingly, I would reverse the decision of the trial court and remand the case to circuit court for trial.

APPENDIX B

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)	SS
COUNTY OF LAKE	)	FOURTH JUDICIAL CIRCU
THE STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	
v.	)	MOTION TO SUPPRESS
MASON HENRY NEVILLE,	)	
Defendant.	)	

* *

Comes now David R. Gienapp, counsel for the Defendant in the above captioned matter and moves this Court for its Order suppressing as evidence in the trial of the above captioned matter, any and all evidence of Defendant's refusal to submit to a blood alcohol test on the grounds and for the reasons that: SDCL 32-23-10.1 is unconstitutional in that it violates Defendant's Fourth, Fifth and Sixth Amendment rights, and for the further grounds and for the

further reasons that the procedures utilized by the arresting officer in advising the Defendant of his potential rights were violative of Defendant's Fourth, Fifth, and Sixth Amendment rights.

Dated this 17th day of September, 1980.

ARNESON, ISSENHUTH AND GIENAPP

By: /s/ David R. Gienapp
Attorney for Defendant
118 West Center Street
Madison, South Dakota 57042

APPENDIX C

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
)	
COUNTY OF LAKE)	FOURTH JUDICIAL CIRCU
THE STATE OF SOUTH DAKOTA,)	
Plaintiff,)	PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW PERTAINING TO DEFENDANT'S MOTION TO SUPPRESS ANY AND ALL EVIDENCE OF DEFENDANT'S REFUSAL TO SUBMIT TO A BLOOD ALCOHOL TEST
v.)	
MASON HENRY NEVILLE,)	
Defendant.)	Crim. 80-914

++

The Defendant, by and through his attorney, David R. Gienapp, filed a Motion with this Court dated September 17th, 1980, moving the Court to suppress as evidence at trial any and all evidence of Defendant's refusal to submit to a blood alcohol test.

A hearing was held before the Court on September 23, 1980, the Defendant being represented by David R. Gienapp, Attorney at Law,

and the State being represented by Wilson Kleibacker, Lake County States Attorney and evidence having been submitted, and argument heard, and this Court having reviewed all the evidence and arguments submitted, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

That the Defendant is charged with the crime of being in actual physical control of a vehicle while under the influence of an alcoholic beverage in violation of SDCL 32-23-1 which alleged crime occurred in Lake County, South Dakota on July 19, 1980.

II.

That the Defendant, Mason Henry Neville, was arrested by Madison Police Officers Jack Treleor and Robert Ishmael who subsequent to the arrest of the Defendant advised him of his

Miranda warnings and his implied consent warnings.

III.

That subsequent to advising the Defendant of his implied consent warnings, the Defendant refused to submit to a blood test.

IV.

That in connection with the implied consent rights given, the arresting officers did not advise the Defendant of the fact that the Defendant's refusal to take the blood test could be used against him at trial pursuant to South Dakota law.

V.

That in advising the Defendant of his implied consent rights, the law enforcement officers giving the advice failed to advise the Defendant of his right to consult with an attorney prior to making his decision as to whether or not he should submit to a blood test.

CONCLUSIONS OF LAW

I.

That the Court has jurisdiction over this case and the motion in this case.

II.

That SDCL 32-23-10.1 is unconstitutional in that it violates Defendant's Fourth, Fifth and Sixth Amendment rights.

III.

That Defendant's refusal to submit to a blood alcohol test is not admissible for the reasons that the arresting officers failed to advise Defendant that his refusal to take the blood test could be used against him at trial and that Defendant had a right to counsel in conjunction with making this decision as to whether or not he should submit to a blood alcohol test.

IV

That any and all evidence of Defendant's refusal to submit to a blood alcohol test should be

suppressed on the grounds that it is irrelevant to any issues before the Court.

Let an Order be entered in accordance with the above Findings of Fact and Conclusions of Law.

Dated this 8th day of October, 1980.

BY THE COURT:

/s/ Marshall Gerken
Circuit Court Judge

ATTEST:

/s/ Anthony W. Benning
Clerk of Courts

By: /s/ Danna J. Fawbush
Deputy

(SEAL)

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)	
COUNTY OF LAKE	)	FOURTH JUDICIAL CIRCUIT
THE STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	
v.	)	ORDER SUPPRESSING EVIDENCE
MASON HENRY NEVILLE,	)	
Defendant.	)	
	)	Crim. 80-914

++

The Defendant by and through his attorney, David R. Gienapp, having moved this Court for a Motion to Suppress any and all evidence of Defendant's refusal to submit to a blood alcohol test, and a hearing having been held, and arguments having been presented to this Court by counsel for both parties, and the Court having entered its Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED that any and all evidence of Defendant's refusal to submit to a blood alcohol test in the above captioned matter shall be and is hereby suppressed for the following reasons:

1. That SDCL 32-23-10.1 is unconstitutional.

2. That prior to requesting the blood test, the arresting officers failed to advise the Defendant of the fact that his refusal to take the blood test could be used against him at trial and they also failed to advise him of his right to consult with an attorney in making this decision.

3. The Defendant's refusal is irrelevant to any of the issues before the trier of fact in this matter.

Dated this 8th day of October, 1980.

BY THE COURT:

/s/ Marshall Gerken
Circuit Court Judge

ATTEST:

/s/ Anthony W. Benning
Clerk of Courts
By: /s/ Danna J. Fawbush
Deputy

(SEAL)

APPENDIX D

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* *

STATE OF SOUTH DAKOTA, Plaintiff, -vs- MASON HENRY NEVILLE, Defendant.	* * * * * * *	PETITION FOR INTERMEDIATE APPEAL SDCL 15-26A-14

* *

Wilson Kleibacker, the duly elected, qualified and acting State's Attorney for Lake County, South Dakota, respectfully petitions the Supreme Court of the State of South Dakota for permission to appeal from an Order Suppressing Evidence in the above-entitled matter, dated October 8, 1980, signed by the Honorable Marshall Gerken, Circuit Court Judge, Fourth Judicial Circuit, which Order was filed with the Clerk of Courts of Lake

County, South Dakota, on October 10, 1980. The appeal is from the entire Order, a portion of which declares SDCL 32-23-10.1 unconstitutional.

This Petition is made pursuant to SDCL 15-26A-14.

This is a D.W.I. case involving prosecution for the Defendant for being under the influence of an alcoholic beverage, in violation of SDCL 32-23-1. The Defendant, after being arrested, was first advised of his Miranda rights, he agreed to talk to the officers, and he was then advised by the officers of the implied consent law. The offense took place on July 19, 1980, but the officers failed to advise the Defendant of the amended portion of SDCL 32-23-11, which went into effect July 1, 1980. At the consent warning, the Defendant made a statement to the effect that he didn't want to take the test because he was too drunk and wouldn't pass it. It is that statement and the refusal which are ordered suppressed by the Circuit Court. The

Circuit Court went on to declare unconstitutional the provisions of SDCL 32-23-10.1, in that it violates the Defendant's Fourth, Fith and Sixth Amendment rights.

Two questions are presented: Whether or not SDCL 32-23-10.1 is unconstitutional as declared by the Circuit Court; and, whether or not the Defendnat's statement made after having been advised of Miranda rights and after having waived those rights would in any case be admissible regardless of the constitutionality of SDCL 32-23-10.1.

It is the position of the State on the first issue that SDCL 32-23-10.1 does not violate the right against self-incrimination. It merely says that the refusal may be admissible. That would allow the arresting officer to testify that the implied consent warning was given to the Defendant, and it was the Defendant's decision not to take a test. The jury would then be aware that the State attempted to obtain a test, and the jury

would not be wondering why a test was not given. Under that fact situation, the actual words used by the Defendant would not be necessary, merely the fact that he was offered the test and no test was given. Under the second issue presented, it's the State's position that once the Defendant was fully advised of his Miranda rights and agreed to waive those rights that any statement thereafter given in answer to the implied consent warning would not violate the Defendant's right to remain silent. His subsequent refusal and admission of his state of intoxication would properly be admissible once fully advised of Miranda. The State further relies on SDCL 19-13-28.1, whose constitutionality was not raised in the Defendant's Motion to Suppress, and consequently the Circuit Court did not rule on the constitutionality of SDCL 19-13-28.1. As State's Attorney, prosecuting individuals for violations of SDCL 32-23-1, it is imperative that I know as soon as possible whether SDCL 32-23-10.1 is

constitutional or not. That has a direct effect on each and every D.W.I. prosecution, since it relates directly to the rights being given by the arresting officer to the Defendant.

This Petition is not interposed for the purpose of delay, but to the contrary is interposed for the purpose of hopefully reaching a quick decision on the two issues presented.

Attached and incorporated herein by this reference are the Motion to Suppress, marked as Exhibit "A"; the Court's Findings of Fact and Conclusions of Law, marked as Exhibit "B"; the Order of the Court dated October 8, 1980 and filed October 10, 1980, suppressing the evidence, marked as Exhibit "C"; the State's Proposed Findings of Fact and Conclusions of Law which were refused by the Court on October 8, 1980, marked Exhibit "D"; and the State's proposed Order Dismissing Defendant's Motion to Suppress Evidence refused by the Court on October 8,

1980, marked Exhibit "E". Also enclosed is a copy of the Information, marked Exhibit "F".

Respectfully submitted this 14th day of October, 1980.

/s/ Wilson Kleibacker
Lake County State's Attorney

Joint Appendix

Office - Supreme Court, U.S.
FILED
JUL 23 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1453

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF SOUTH DAKOTA

Petitioner,

v.

MASON HENRY NEVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH DAKOTA

JOINT APPENDIX

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Counsel for Respondent

PETITION FOR CERTIORARI FILED FEBRUARY 1, 1982
CERTIORARI GRANTED MAY 17, 1982

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THE FOLLOWING MATERIAL WAS REPRODUCED IN THE PETITION FOR WRIT OF CERTIORARI AND WILL NOT BE PLACED IN THE JOINT APPENDIX. THE DOCUMENT IS FOLLOWED BY THE APPROPRIATE PAGE NUMBER FROM THE PETITION FOR WRIT OF CERTIORARI WHERE THE DOCUMENT IS LOCATED.

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RELEVANT DOCKET ENTRIES

Docket Entry	Date
Complaint filed	July 19, 1980
Preliminary hearing	August 21, 1980
Motion to Suppress filed	September 18, 1980
Suppression hearing	September 23, 1980
Findings of Fact, Conclusions of Law, and Order Suppressing Evidence filed. State's Proposed Findings of Fact, Conclusions of Law and Order Refused	October 10, 1980
Petition for Intermediate Appeal filed with South Dakota Supreme Court	October 14, 1980
Order granting Petition for Allowance of Appeal from an Intermediate Order filed	November 26, 1980
Decision by South Dakota Supreme Court	December 2, 1981

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) ss.
COUNTY OF LAKE) FOURTH JUDICIAL CIRCUIT

State of South Dakota,)
)
Plaintiff,)
) TRANSCRIPT OF
vs.)
) SUPPRESSION HEARING
Mason Henry Neville,)
)
Defendant.)

BEFORE: THE HONORABLE MARSHALL GERKEN
Circuit Judge at Madison,
South Dakota on September 23,
1980.

* *

APPEARANCES: For Plaintiff: Wilson Kleibacker
State's Attorney
Box 284
Madison, SD 57042

For Defendant: David R. Gienapp
Attorney at Law
Box 28
Madison, SD 57042

INDEX OF WITNESSES

NAME	D	C	RD	RC
John Treloar	3			
Robert Ishmael	10			

Court's ruling, page 14

THE COURT: This is the matter of the State of South Dakota versus Mason Neville. Mr. Gienapp, you filed a motion here?

MR GIENAPP: Yes, your Honor. I have filed a motion to suppress certain evidence at trial, that evidence specifically being any evidence of the defendant's refusal to submit to a blood alcohol test on a constitutional ground, asking it be suppressed at trial and in conjunction with that, I believe I orally advised by writing Mr. Kleibacker that in connection with that motion desired to have some evidence introduced on the record through the arresting officer.

MR. KLEIBACKER: Other than what was had at the preliminary hearing?

MR. GIENAPP: Yah. I've got no problem stipulating to the transcript of the preliminary hearing, your Honor, but I believe at preliminary hearing some of the evidence, through prior agreement with counsel, might have been in the neighborhood of hearsay but Mr. Treloar was out of

town on that particular date. He was the arresting officer and I desire to put him on the stand.

THE COURT: You may proceed.

MR. GIENAPP: Call Officer Treloar.

JOHN TRELOAR, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q (by Mr. Gienapp) Would you state your name, please?

A John Treloar.

Q What is your occupation?

A Police Officer for the City of Madison.

Q Were you engaged in that capacity on the 19th day of July, 1980?

A Yes, I was.

Q Did you have occasion to be involved in the arrest of an individual named Mason Henry Neville on the charge of D.W.I.?

A Yes, I did.

Q Could you give me the background as to how you came to stop Mr. Neville?

A Yes. Approximately 9:09, Officer Ishmael and myself were southbound in the 100 Block of South Washington and observed a vehicle in the 300 Block of Southeast First Street eastbound. This vehicle failed to stop at the stop sign at the intersection of Southeast First then proceeded south on Washington. I stopped this vehicle in approximately the 300 Block on Washington and approached the driver of the vehicle who I later found out was Mason Neville. At this time, I asked him if he knew why we stopped him. He stated yes, I went through the stop sign back there. I then asked for his driver's license and please exit the car. Upon exiting the car, he staggered and fell against his own vehicle to support him or balance him. At this time, I could smell what appeared to be an odor of alcoholic beverage upon his breath and person. I then asked him for his driver's license. He stated

"I'm not going to lie to you. I don't have one." I then stated you mean you lost it or left it at home or you don't even have one? Then he said "I lost it to a previous D.W.I. conviction." I then asked him to perform a field sobriety test and he said he would. From the street we went up to the sidewalk where he was given several types of field sobriety tests, finger-to-nose, walking the line. The smell of his breath, his coordination and everything, Officer Ishmael and myself came to the conclusion he was too intoxicated to be driving the vehicle. I placed Mr. Neville under arrest for D.W.I. and read him his Miranda Warning and he said he understood his rights. Officer Ishmael then read the Implied Consent. He refused to take the blood test. He stated he was too drunk and that he wouldn't pass the test.

Q Were these Miranda rights and Implied Consent rights, were they read off a card?

A Yes.

Q Do you have those cards with you today?

A Yes.

Q For the record, read into the record specifically what was advised Mr. Neville.

A I'll start with the Miranda Warning. "You have the right to remain silent. You don't have to talk to me unless you want to do so. If you want to talk to me I must advise you whatever you say can and will be used as evidence against you in court. You have the right to confer with a lawyer, and to have a lawyer present with you while you're being questioned. If you want a lawyer but are unable to pay for one, a lawyer will be appointed to represent you free of any cost to you. Knowing these rights, do you want to talk to me without having a lawyer present? You may stop talking to me at any time. You may also demand a lawyer at any time." Officer Ishmael read the Implied Consent. He read "I have arrested

you for driving or being in actual physical control of a vehicle while under the influence of alcohol or drugs, a violation of S.D.C.L. 32-23-1. I request that you submit to a chemical test of your blood to determine your blood alcohol concentration. You have the right to refuse to submit to such a test and if you do refuse no test will be given. You have the right to a chemical test by a person of your own choosing at your own expense in addition to the test I have requested. You have the right to know the results of any chemical test. If you refuse the test I have requested, your driver's license and any non-residence driving privilege may be revoked for one year after an opportunity to appear before a hearing officer to determine if your driver's license or non-residence driving privilege shall be revoked. If your driver's license or non-residence driving privileges are revoked by

the hearing officer, you have the right to appeal to Circuit Court. Do you understand what I told you? Do you wish to submit to the chemical test I have requested?"

Q Was it immediately subsequent to the advice by Officer Ishmael of the Implied Consent rights that the defendant refused to submit to the chemical test?

A If I understand you right, after reading him the Miranda Warning he read this immediately after and after being read the Implied Consent rights was he then asked if he wanted to sumit to the test?

Q Yes. And, did he?

A He stated then that "i'm too drunk, I won't pass the test." He was read this again.

Q What happened then?

A I secured the vehicle and we took him back to the police station and at the police station this time, I, myself, read the Implied Consent.

Q To avoid putting it in the record, this would have been the identical reading Officer Ishmael gave him?

A Yes. I then again read it at the police station and his answer was the same, "I'm too drunk, I won't pass the test."

Q In conjunction with the Implied Consent rights, did you in any way, you or Officer Ishmael, in any way advise him that his refusal to take those tests could be used against him?

A No.

Q Did you advise him that in respect to taking that test, his decision in taking that particular test that he had the right to consult counsel?

A We read him his rights. He agreed to talk to us without a lawyer present. Also, that he understood his rights after we asked him if he did.

Q The Miranda was before you read the Implied Consent rights, though, isn't that correct?

A His Miranda was read first.

Q And, he acknowledged he understood that?

A Yes, he did.

Q And, proceeded to--

A --then we read him the Implied Consent rights.

Q In conjunction with his decision, his right to make a decision as to whether or not he wanted a blood test, did you advise him that he had the right to consult with an attorney as to whether or not he wanted to take or refuse a blood test?

A He made one statement, that he was too drunk to take the test. No other questions were asked at the scene and back at the police department I didn't know if he was confused or what so that's why I read it to him again and at that time he said no, I just won't pass the test.

Q But, you, yourself, or Officer Ishmael did not ask him or advise him that he had the right to consult with an attorney in conjunction with his

decision on whether or not he should take the blood test, is that correct?

A No, we never talked about that other than what the rights on the Miranda card that was read to him and he said that he understood.

Q It's correct, is it not, this might be repetitious, but that he was not advised specifically by you or Officer Ishmael that under South Dakota law his refusal to take the blood test could be introduced as evidence against him?

A When I read the Implied Consent, I went step by step, went through each one and he stated that he understood. That's what I usually do. I asked if he understood at the police department and he said he understood each one.

Q But, that particular statement is not in the Implied Consent rights that you read him, is that correct, that under South Dakota law his refusal to submit to a blood alcohol test can be used against him in trial?

A I don't have--I just got the new card a week ago.

Q And, you used this particular card that time?

A Yes, that's correct.

Q Subsequent to that time, you now are advising them of that particular aspect?

A Yes.

MR. GIENAPP: I believe that's all I have, your Honor.

MR. KLEIBACKER: I have no questions, your Honor.

THE COURT: Who do you get those cards from?

THE WITNESS: The police chief gave us these two and then the new cards which I received last Monday I think he sent to Pierre for them. This is the new one I just received.

THE COURT: That is late of Pierre in getting them out.

MR. GIENAPP: I guess in light of that I would for the record, too, have Officer Treloar read into the record the new revised card.

MR. KLEIBACKER: I object to that being irrelevant. We know what was said at the scene. What someone may have done later has no bearing on what took place on this day in question.

MR. GIENAPP: It does in products liability.

THE COURT: Sustained. You can step down.

(Witness excused)

MR. GIENAPP: I'd like to call Officer Ishmael just briefly.

ROBERT ISHMAEL,

called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q (by MR. GIENAPP) State your name?

A Robert Ishmael.

Q You are a police officer with the Madison Police Department, is that correct?

A That's correct.

Q And, you were involved with Officer Treloar on the arrest of Mason Neville on the 19th day of July in Lake County, is that correct?

A That's correct.

Q You have been present in court during Officer Treloar's testimony?

A Yes, I have.

Q And, you have had the opportunity to hear Officer Treloar's testimony relating to the advice of the Implied Consent rights and the advice of certain Miranda warnings on that particular evening to Mr. Neville?

A That's correct.

Q Would you concur in his rendition of the facts as to the exact rights that were given him that particular night?

A Well, there was some question. First of all, I remember now that Officer Treloar had two cards. I think I testified before that possibly at the police station I read verbatim off our reports, which sometimes we do. I do remember reading those rights off Officer Treloar's card at the scene.

Q And, those would have been the cards that he read into the record here today?

A Yes, that's correct. I think I basically said before that I believe those rights were just about the same as what they are on our forms that we do use.

Q What I am getting at is what Officer Treloar testified was read were the cards that were read at that particular time?

A That's correct.

Q And, there was no advice of his rights to an attorney in conjunction with the Implied Consent?

A Other than the Miranda warning and Implied Consent being read verbatim off the card there was no other.

Q There was no advice to him that his refusal to take that particular test could be used?

A I don't think there was, no.

MR. GIENAPP: That's all.

MR. KLEIBACKER: I have no questions.

THE COURT: You may step down.

(Witness excused)

MR. GIENAPP: I have no additional evidence to submit to the Court at this time, your Honor, and, I guess, I can state to the Court that when I first contacted Mr. Kleibacker regarding this particular motion I told him I would not give a brief, which I did not and I guess I would request a couple days to submit a brief to the Court because I have just not had an opportunity to research this to the extent that I desire at this particular time.

MR KLEIBACKER: I guess the problem I see on waiting on a brief, your Honor, is that we have an October 1 trial date. Today is the 23rd. The trial date is a week from today. I can tell the Court my position quite simply and I'd like to do so, I guess, and if the Court wishes to have briefs after that, I'd be glad to comply. The argument that, as I understand that counsel is making, is that the

change on the Implied Consent law that now authorizes the statement in court of the defendant's failure to take a blood test is unconstitutional. Well, I don't think that that is a point with the fact that we have, I think, it's a moot question. He was given the Miranda Warning prior to the Implied Consent and his making a verbal refusal stating to the effect I don't want to take the test, I'm too drunk, is an admission being made by him after being advised of Miranda and that being the case that statement is a waiver by him of any rights that he might otherwise have. I don't think we get to a constitutional question.

MR. GIENAPP: I guess I disagree even for the sake of argument at this time with that particular statement because S.D.C.L. 32-23-10.1 is unconstitutional and on its face the statute obviously does not exist. Consequently, you go back to the Supreme Court decision in Oswald which basically states this refusal was not admissible, and that refusal is not admissible regardless of whether the

Miranda was given or not. In addition to that, I feel if Miranda was not satisfied, just basic requirement, that he has to be advised of it because basically at this point you're getting into an evidentiary situation in conjunction with the Implied Consent which involves an attorney, requires an attorney's involvement because the defendant is making a decision relating to certain evidence that can be and will be utilized against him in time. It's no longer the situation as the Supreme Court has said in other occasions that the Implied Consent is a separate civil matter while a D.W.I. is a criminal matter because you're bringing in through that statute through the Implied Consent laws criminal evidence and criminal--or decisions making process relating to criminal evidence. Also, the fact that the Implied Consent rights were obviously read separate and distinct from the Miranda Warning afterward, I feel that the basic constitutionality of the statute involved is not affected whatsoever regardless of what the officer told him.

MR. KLEIBACKER: I don't think Oswald had the Miranda in there, your Honor, and I think that that case is clearly distinct because of that and I guess it would be my contention, under this fact situation, prior to July 1, his admission would have been admissible regardless of our new statute.

THE COURT: Well, it's the holding of the Court, S.D.C.L. 32-23-10.1 is unconstitutional. Further, that the fact that the defendant refuses a blood test, I don't see where that is relevant to the issues in the case whether or not he is guilty of the offense charged. Further, that he was not warned that his refusal could be used against him in a criminal proceeding and this definitely is not the fault of the arresting officer. The State didn't get around to getting those things out. Therefore, the motion is granted. It's still on for trial, though, unless you want to appeal to the Supreme Court.

MR. KLEIBACKER: That might happen.

THE COURT: Let's talk about that off the record. That will be the decision.

MR. KLEIBACKER: That's all I have.

(End of proceedings)

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAKE	)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
	)	
Plaintiff,	)	STATE'S PROPOSED
	)	FINDINGS OF FACT AND
-vs-	)	CONCLUSIONS OF LAW
	)	ON DEFENDANT'S MOTION
MASON HENRY NEVILLE,	)	TO SUPPRESS EVIDENCE
	)	
Defendant.	)	

A hearing was held on September 3, 1980 before the Honorable Marshall Gerken, Circuit Court Judge, to hear the Defendant's Motion of September 17, 1980, moving the Court to suppress all evidence at trial of Defendant's refusal to submit to a blood alcohol test. Representing the Defendant was David R. Gienapp, attorney at law, Madison, South Dakota, and the State was represented by Wilson Kleibacker, Lake County State's Attorney. The Court heard arguments of counsel, heard the testimony introduced at said hearing, and having reviewed the transcript of the preliminary hearing which was held on August 21, 1980, the transcript thereof being dated September 12, 1980, and being incorporated in said hearing, and the Court having been otherwise fully advised in the premises, and having heard arguments submitted, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1.

That the Defendant is charged with the crime of being in actual physical control of a vehicle while

under the influence of an alcoholic beverage in violation of SDCL 32-23-1, which alleged crime occurred in Lake County, South Dakota on July 19, 1980.

2.

That the Defendant, Mason Henry Neville, was arrested by Police Officers John Treloar and Robert Ishmael, who subsequent to the arrest, advised the Defendant first of his Miranda warnings and then immediately thereafter advised the Defendant of the implied consent warning.

3.

That the Defendant indicated he understood the Miranda warning and did agree to talk to the Officers, all prior to the implied consent warning.

4.

That the implied consent warning given by the Officers to the Defendant did not include any reference to the amended portion or new portion of SDCL 32-23-11, which went into effect on July 1, 1980.

5.

That the implied consent warning given advised the Defendant that he had been arrested for being in actual physical control of a motor vehicle while under the influence of alcohol or drugs in violation of SDCL 32-23-1, it advised that the Officer requested Defendant to submit to a chemical test of his blood to determine the alcohol concentration; it advised the Defendant that he had the right to refuse to submit to such alcohol test, and, if he did refuse, that no test would be given; it further advised that the Defendant had a right to a chemical

test by a person of his own choosing at his own expense in addition to the test requested by the Officer; the Defendant was further advised that if he refused the test that his driver's license and any non-resident driving privilege may be revoked for one year, after an opportunity to appear before a hearing board to determine if his driver's license or non-resident driving privilege should be revoked; the Defendant was further advised that if his driver's license or non-resident driving privilege is revoked by a hearing officer, that he would have the right to appeal to Circuit Court; that at the conclusion of that, the Defendant was asked if he understood his rights; he indicated he did and he then indicated that he did not wish to submit to a chemical test.

6.

That the Defendant was not advised that if he refuses to submit to a chemical analysis of his blood and subsequently stands trial for driving while under the influence of alcohol, that such refusal may be admissible into evidence at trial.

7.

That the Defendant refused the blood test by making a statement to the effect that he didn't want to take the test because he was too drunk and wouldn't pass.

CONCLUSIONS OF LAW

1.

That the Court has jurisdiction over this case and the Motion in this case.

2.

That the Defendant was fully and completely advised of his Miranda rights and warnings, and that he thereafter voluntarily agreed to talk to the Officers.

3.

That the Defendant was fairly advised of the implied consent law and the failure of the Officer to fully advise the Defendant of the amendments made to SDCL 32-23-11 were minor and harmless error.

4.

That in any case, the Defendant's statement to the effect that he would not pass the test because he was too drunk were given after being advised of his Miranda rights and would therefore be admissible into evidence.

5.

That SDCL 32-23-10.1 is constitutional, and thereunder the State may introduce evidence of the Defendant's refusal to submit to the blood test at trial.

6.

That the South Dakota implied consent law as set forth in SDCL 32-23-10 does not require the Defendant to be advised of SDCL 32-23-10.1, and there is no legal duty upon the Officer at the time of arrest to so advise the Defendant that his refusal may subsequently be admissible at trial.

7.

That because the Defendant was fully advised of his Miranda warnings prior to the implied consent warning, the Defendant was fully advised as to his right to counsel.

8.

That any and all evidence of the Defendant's refusal to submit to a blood alcohol test is admissible at trial and the Defendant's Motion to Suppress Evidence should be dismissed.

Let an Order be entered accordingly,

Dated this _____ day of October, 1980.

BY THE COURT:

_____
MARSHALL GERKEN
Circuit Court Judge

ATTEST:

_____
ANTHONY W. BENNING
Clerk of Courts

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAKE	)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
	)	
Plaintiff,	)	
	)	ORDER DISMISSING
v.	)	DEFENDANT'S MOTION
	)	TO SUPPRESS EVIDENCE
MASON HENRY NEVILLE,	)	
	)	
Defendant.	)	

The Defendant by and through his attorney, David R. Gienapp, of Madison, South Dakota, having moved this Court for a Motion to Suppress any and all evidence of Defendant's refusal to submit to a blood alcohol test, and a hearing having been held before this Court on September 23, 1980, and testimony having been given, and arguments having been presented to this Court, the State having been represented by Wilson Kleibacker, Lake County State's Attorney, and the Court having made its decision, and having entered its Findings of Fact and Conclusions of Law;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the Motion of Defendant dated September 17, 1980, should be dismissed upon its merits, and it is further the Order of the Court that SDCL 32-23-10.1 is constitutional; that the arresting officers properly advised the Defendant of his Miranda rights and implied consent rights, and the State may at trial offer as evidence statements made by the Defendant while refusing the blood test, as well as evidence of his refusal.

Dated this _____ day of October, 1980.

BY THE COURT:

_____
MARSHALL GERKEN
Circuit Court Judge

ATTEST:

_____
ANTHONY W. BENNING
Clerk of Courts

Opposition

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NO. 81-1453

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF SOUTH DAKOTA,

Petitioner,

v.

MASON HENRY NEVILLE,

Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

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STATE OF SOUTH DAKOTA,

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TO THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

JURISDICTIONAL STATEMENT

The Respondent has no objection to the jurisdictional statement embodied in Petitioner's Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Respondent adopts the itemization of the constitutional provisions and statutes involved in Petitioner's Petition for Writ of Certiorari. In addition, Article VI, Section 9 of the Constitution of the State of South Dakota is discussed in this brief which reads as follows:

"No person shall be compelled in any criminal

case to give evidence against himself or be twice put in jeopardy for the same offense."

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case and Statement of Facts embodied in Petitioner's Petition for Writ of Certiorari.

REASONS FOR DENYING PETITIONER'S WRIT OF CERTIORARI

THE SOUTH DAKOTA SUPREME COURT RULED PROPERLY IN STATE V. NEVILLE, 312 NW 2d 723 (S.D., 1981) WHEN THEY DETERMINED THAT SDCL 32-23-10.1 WAS UNCONSTITUTIONAL IN THAT IT WAS VIOLATIVE OF THE DEFENDANT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION.

In Schmerber v. California, 384 US 757 (1966) this Court specifically avoided ruling on the issue presented in this case. In refusing to so rule, at page 916 the Court made reference to the introduction into evidence of the fact that a Defendant refused to submit to a breathalyzer test. The Court did not rule in that specific issue since no objection was made at the trial level, however, the Court did state as follows:

"We think general Fifth Amendment principals rather than the particular holding in Griffin, would be applicable in these circumstances, see Miranda v. Arizona, 384 US at Page 468, note 37, 16 L.Ed.2d at Page 720, 10 ALR 3d, 974."

The Schmerber decision also went on to basically state in the same series of footnotes, that even if someone had to be tested or agreed to be tested, that incriminating evidence may be an unavoidable by-product of this compulsion and that the State may have to forego the advantage of any testimonial by-products of administering

the test. The series of footnotes previously cited indicate a concern about the Fifth Amendment ramifications of the Schmerber decision. Schmerber allows compulsory testing but within the context of the Schmerber facts indicates that there would be no testimonial by-products of this testimony such as statements or non-statements which would infringe on an individuals Fifth Amendment rights as outlined in Miranda v. Arizona, 384 US 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966).

The evidence which the Petitioner desires to introduce in this particular factual situation is a communicative act. The South Dakota Supreme Court correctly analyzed Schmerber in light of this factual situation in arriving at its decision that the test should be "whether a Defendant's refusal to take a chemical analysis test is a communicative act involving that persons testimonial capacities, or if it is real or physical evidence which does not fall within the privilege." The South Dakota Supreme Court properly found that a Defendant's silence or actual refusal to submit to a blood test is "communicative or testimonial" rather than "real or physical". In so deciding, the Court cited People v. Thomas, 46 NY2d 100, 412 NYS2d 845, 385 NE2d 584 (1978); Gay v. City of Orlando, 202 So.2d 896 (Fla., 1967), cert. denied, 390 US 956, 88 S.Ct. 1052, 19 L.Ed.2d 1149 (1968).

The second question which had to be answered once the South Dakota Supreme Court found the refusal was communicative is whether or not the testimony was compelled. There is no question that the Respondent was informed of the so called implied consent rights, which concluded by asking for an oral answer. There was no option given to

the Respondent, nor was he informed that the response could be used against him. As a consequence, there is no question that the statements that Petitioner desires to place into evidence are statements which were acquired through compulsion by the law enforcement officers and certainly was not constitute a voluntary statement but a compelled response.

Petitioner's brief cites a number of jurisdictions which ruled in accordance with the South Dakota decision in State v. Neville, 312 NW2d 723 (S.D., 1981) and also cites a number of jurisdictions finding contrary to the South Dakota decision. Their contention appears to be that because of the split in authority, the Neville decision is the vehicle by which this Court should resolve these differences between jurisdictions. There are two factors distinctive to the factual and legal scenario present in Neville which are not alluded to in Petitioner's brief which isolate Neville from decisions in other states and which would indicate that Neville is not the best vehicle to resolve the disputes between jurisdictions.

The first important aspect of this case not referred to in Petitioner's brief is that the trial Court found that the introduction was violative of not only the Federal Constitution, but also the constitution of the State of South Dakota. There is an important distinction between the Fifth Amendment of the United States Constitution and its equivalent in the Constitution of the State of South Dakota which is Article VI, Section 9, which states as follows:

> "No person shall be compelled in any criminal case to give evidence against himself or be twice put in jeopardy for the same offense."

The Fifth Amendment protection involved in this case is more liberal under the South Dakota Constitution than the United States Constitution in that we are dealing under the South Dakota Constitution with a protection against giving evidence against himself as opposed to merely being a witness against himself. Assuming for the sake of argument, that SDCL 32-23-10.1 does not compel an individual to be a witness against himself and as a consequence, is not violative of the Fifth Amendment of the United States Constitution, there still is no question that it is violative of the South Dakota Constitution because it does compel the giving of evidence against himself which is contrary to Article VI, Section 9 of the South Dakota Constitution.

The second factor which should be brought to the Court's attention for consideration in making its determination as to whether or not the Petition for Writ of Certiorari should be granted is the fact that the trial Court ruled that the involved testimony was not admissible on three separate grounds. (Petitioner's Appendix A-32). One of these grounds is that the Defendant's refusal was irrelevent to any of the issues before the trier of facts in this matter. The statute involved, SDCL 32-23-10.1, provides that the introduction is discretionary as opposed to mandatory by providing that the refusal MAY (emphasis supplied) be admissible into evidence at trial. Under this factual situation, the trial Court has already ruled that the refusal is not admissible on relevancy grounds, and as a consequence, the Constitutional issue as to the actual application of the statutue to

this case is irrelevant since it has been decided that the same is not admissible under the plain wording of the statute.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent, Mason Henry Neville, requests that the Petition by the State of South Dakota for Writ of Certiorari to the Supreme Court be denied.

Respectfully submitted,

DAVID R. GIENAPP
Attorney for Respondent
Mason Henry Neville
118 West Center Street
P.O. Box 28
Madison, South Dakota 57042
Telephone (605) 256-3534

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of Reply to Petition for Writ of Certiorari to the Supreme Court of the State of South Dakota in the case of the State of South Dakota v. Mason Henry Neville, was served by United States Mail, first class, postage prepaid, upon Mark Meierhenry, Attorney General, Capitol Building, Pierre, South Dakota 57501 on the 22nd day of April, 1982.

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Petitioner,

v.

MASON HENRY NEVILLE,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Comes now David R. Gienapp, counsel for Respondent Mason Henry Neville, and moves this Court for its Order allowing the Respondent to proceed in forma pauperis in all matters and in connection with all proceedings herein.

This Motion is based on the files and records herein along with the Affidavit attached hereto and by reference adopted herein.

Dated this 22nd day of April, 1982.

David R. Gienapp
Arneson, Issenhuth and Gienapp
Attorney for Respondent Mason
Henry Neville
118 West Center Street
Madison, South Dakota 57042

NO. 81-1453

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF SOUTH DAKOTA,

Petitioner,

v.

MASON HENRY NEVILLE,

Respondent.

AFFIDAVIT IN SUPPORT OF
MOTION TO PROCEED IN FORMA PAUPERIS

State of South Dakota)
) ss
County of Lake)

DAVID R. GIENAPP, being first duly sworn, deposes and states as follows:

I.

That he is counsel for the Respondent, Mason Henry Neville.

II.

That affiant was originally retained in this matter, however, through the course of the State Court appeal and the fact that Respondent became unemployed, the Respondent reached indigency status.

III.

That the Respondent for a period of time did not

communicate with counsel and it was necessary for counsel to bring Respondent before the Circuit Court for and in Lake County, South Dakota, the Court of original jurisdiction, pursuant to an Order to Show Cause as to whether or not affiant should not be discharged as counsel of record.

IV.

That a hearing was held before South Dakota Circuit Court Judge Boyd L. McMurchie on Tuesday, April 13, 1982 at which time Respondent filled out and executed an Affidavit of Indigency in connection with this matter.

V.

At said hearing the same Affidavit was accepted by the Court, under oath, and the Circuit Court for and in the State of South Dakota found that said Respondent, Mason Henry Neville, was indigent and entered an Order appointing affiant to represent Respondent as an indigent under the South Dakota Criminal Justice Procedures as Court appointed counsel with all costs and obligations to be the responsibility of Lake County, South Dakota.

VI.

That affiant is proceeding as Court appointed counsel having been so appointed by Order of the Circuit Court of South Dakota and duly and verily feels that the Respondent is indigent and that the Court should enter its Order pursuant to the Supreme Court Rule 46 that Respondent may proceed in all matters herein in forma pauperis.

Dated this 22nd day of April, 1982.

David R. Gienapp

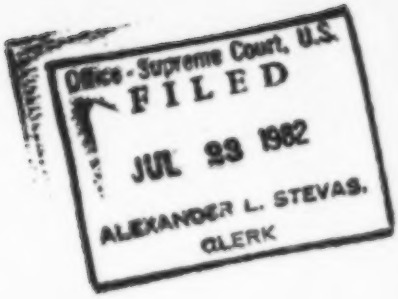
Subscribed and sworn to before me
this 22nd day of April, 1982.

Thomas M. Issenhuth
Notary Public, South Dakota

My Commission Expires: 7-17-84

SEAL
THOMAS M. ISSENHUTH
NOTARY PUBLIC
SOUTH DAKOTA
My Commission Expires JULY 17, 1984

Petitioner's Brief



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Petitioner,

v.

MASON HENRY NEVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH DAKOTA

BRIEF OF PETITIONER

MARK V. MEIERHENRY
ATTORNEY GENERAL

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Counsel for Petitioner

QUESTION PRESENTED

Whether SDCL 32-23-10.1, which allows the fact of the refusal to take a test to determine the blood alcohol content of a motorist to be admitted into evidence at the subsequent trial of the motorist for driving while under the influence of alcohol, violates the Fifth Amendment privilege against self-incrimination?

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The opinion of the Supreme Court of the State of South Dakota is reported, with the following citation: State v. Neville, 312 N.W.2d 723 (S.D. 1981).

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH DAKOTA

BRIEF OF PETITIONER

JURISDICTIONAL STATEMENT

The Judgment of the Supreme Court of the State of South Dakota was entered on December 2,

1981. The Petition for Writ of Certiorari was filed on February 1, 1982, within the time set by Rule 20.1 of the Rules of the Supreme Court. The Petition for Writ of Certiorari was granted on May 17, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The relevant provisions of the South Dakota Codified Laws, SDCL 32-23-10 and SDCL 32-23-10.1, SDCL 32-23-11, and SDCL 19-13-28.1 are as follows:

> SDCL 32-23-10. Any person who operates any vehicle in this state shall be deemed to have given his consent to a chemical analysis of his blood, urine, breath or other bodily substance for the purpose of determining the amount of alcohol in his blood, as provided in § 32-23-7, provided that such test is administered at the direction of a law enforcement officer having lawfully arrested such person for a violation of § 32-23-1.
>
> Such person shall be requested by said officer to submit to such analysis and shall be advised by said officer of his right to refuse to submit to such analysis and the provisions of §§ 32-23-11 and 32-23-12 in the event of such refusal with respect to the revocation of such person's driving license.
>
> SDCL 32-23-10.1. If a person refuses to submit to chemical analysis of his blood, urine, breath or other bodily substance, as provided in § 32-23-10, and that person subsequently stands trial for driving while under the influence of alcohol or drugs, as provided in § 32-23-1, such refusal may be admissible into evidence at the trial.

SDCL 32-23-11. Any person described in § 32-23-10 not given a chemical analysis because of his right to refuse such test shall have the opportunity to demand a hearing pursuant to chapter 1-26 before further action is taken under this section. After this opportunity, if the department finds that the law enforcement officer complied with the law and the refusal was made by the person, then the department may revoke for one year both that person's license to drive and any nonresident operating privileges which he may have in his possession. The department may also allow the person to drive under restrictions which it may impose. The provisions of this section do not apply to a person who pleads guilty to an offense in which the results of a chemical analysis test, if taken, would have been admissible in evidence, provided that the plea of guilty is entered before any departmental hearing in regard to the refusal has taken place.

SDCL 19-13-28.1. Notwithstanding the provisions of § 19-13-28, when a person stands trial for driving while under the influence of alcohol or drugs, as provided under § 32-23-1, and that person has refused chemical analysis, as provided in § 32-23-10, such refusal is admissible into evidence. Such person may not claim privilege against self-incrimination with regard to admission of refusal to submit to chemical analysis.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Senate Bill 36 of the Fifty-fifth session of the South Dakota Legislative Assembly became law on July 1, 1980. Section 1 of that act added what is now SDCL 32-23-10.1 to the state statutes dealing with drunk drivers. SDCL 32-23-10.1 provides for the admission into evidence, at a trial for the offense of driving while under the influence of alcohol [hereinafter referred to as DWI], the fact that the driver refused to submit to a test to determine his blood alcohol content, after the test had been requested by a law enforcement officer.

In the early evening hours of July 19, 1980, Mason Henry Neville [hereinafter referred to as "Neville"] was stopped by city police after having been observed failing to stop for a stop sign. When Neville exited his vehicle, he staggered and fell against his own vehicle to balance himself. The arresting officer, Madison (South Dakota)

Police Officer Jack Treloar, smelled the odor of alcoholic beverage on Neville's breath and person. After failing to satisfactorily perform several field sobriety tests, Neville was given the Miranda, warnings. He indicated that he understood his rights. He was then informed of the state implied consent provisions and asked to submit to the blood test. Neville refused to submit to the blood test, stating that he was too drunk and would not pass the test. Joint Appendix 6-7.

B. PROCEDURAL HISTORY

After Neville was arrested and charged for DWI on July 19, 1980, a Preliminary Hearing was held before the Honorable Marshall Gerken, Circuit Judge for the Fourth Judicial Circuit, on August 21, 1980. As a result of the Preliminary Hearing, Neville was bound over to circuit court for trial on the DWI charge.

On September 18, 1980, Neville filed a Motion to Suppress evidence with the Lake County Clerk of Courts. Appendix to Petition for Certiorari

[hereinafter "App. to Pet."], A24-A25. The evidence sought to be suppressed was Neville's refusal to submit to a blood alcohol test. Neville's Motion to Suppress claimed that SDCL 32-23-10.1 was unconstitutional because it violated his Fourth, Fifth, and Sixth Amendment rights.

The hearing on Neville's Motion to Suppress was held before Judge Gerken on September 23, 1980. The Motion to Suppress was granted. The Suppression Order and related Findings of Fact and Conclusions of Law were entered by the Court on October 8, 1980, and were filed on October 10, 1980. App. to Pet., A26-A32. The court's decision to grant Neville's Motion to Suppress was based on the finding by the court that SDCL 32-23-10.1 violated Neville's Fourth, Fifth and Sixth Amendment rights.

On October 14, 1980, the State of South Dakota, through Lake County State's Attorney Wilson Kleibacker, filed a Petition for Intermediate Appeal with the Supreme Court of South Dakota,

seeking immediate review of the order suppressing the evidence of Neville's refusal to submit to a blood alcohol test. App. to Pet., A33-A38. This Petition sought review of the conclusion by the trial court that SDCL 32-23-10.1 violated Neville's Fourth, Fifth and Sixth Amendment rights. On November 26, 1980, the State of South Dakota's petition was granted by the Supreme Court of the State of South Dakota.

On September 28, 1981, the instant matter was argued before the Supreme Court of South Dakota. The decision, affirming the trial court's decision, was issued by the Supreme Court of South Dakota on December 2, 1981. App. to Pet., A1-A23. The Supreme Court of the State of South Dakota found that Neville's Fifth Amendment privilege against self-incrimination was violated by SDCL 32-23-10.1. Further references to the decision of the South Dakota Supreme Court will be made to the reported decision in the Northwestern Reporter, second series.

The Petitioner State of South Dakota [hereinafter referred to as "State"] filed its petition for Writ of Certiorari on February 1, 1982. This Petition sought review of the decision by the South Dakota Supreme Court. The Petition for Writ of Certiorari was granted on May 17, 1982.

SUMMARY OF ARGUMENT

The evidence of the fact that a driver was offered a blood test after being arrested for DWI, and that the driver refused to submit to such a test, is important evidence in the subsequent trial of the driver for DWI. This evidence eliminates the deception that is created when these facts are suppressed. When no test results are produced at the trial, the jury must conclude that no test was offered. Statutes, such as SDCL 32-23-10.1, eliminate this unfair and unnecessary legal fiction.

Statutes which allow for the evidentiary use of the refusal to submit are proper under the Fifth Amendment. Because the refusal is "real or

physical" evidence, rather than "testimonial or communicative," the protections afforded by the Fifth Amendment are inapplicable. Additionally, because there is no constitutional right to refuse to submit to such testing, the use of the refusal to submit as evidence does not burden any protected rights.

Rather than violating a driver's Fifth Amendment protection against self-incrimination, SDCL 32-23-10.1 is a proper action by the state legislature, within the scope of its authority to control drunk drivers. By refusing to submit to a chemical test, a driver has invoked his statutory power to refuse, which was granted by the legislature. He has no constitutional right to refuse. A state may condition the grant of the power to refuse to submit. In South Dakota, SDCL 32-23-11 places one condition on the power to refuse to submit in the form of a one year suspension of driving privileges for such refusal. SDCL 32-23-10.1 is simply one other condition.

The great weight of authority in regard to the question presented in this appeal is that the evidentiary use of the refusal to submit is constitutionally proper. These decisions reach this conclusion by analyzing Schmerber v. California, 384 U.S. 757 (1966), and finding that it does not expand the Fifth Amendment protection against self-incrimination to a driver, who is arrested for DWI and who does not submit to the chemical testing requested under the implied consent law. Because the fact of refusal to submit is "real or physical" evidence, the warning set forth in footnote 9 of Schmerber is inapplicable. To find otherwise would require a reassessment of the well-founded principles set forth in Schmerber and other decisions which deal with the Fifth Amendment and which distinguish between the treatment afforded to "real or physical" evidence and evidence which is "communicative or testimonial" in nature. Because the refusal to submit

is "real or physical" evidence, the self-incrimination protections are inapplicable.

ARGUMENTS AND AUTHORITIES

THE EVIDENTIARY USE OF THE REFUSAL TO SUBMIT TO A BLOOD TEST REQUESTED PURSUANT TO THE SOUTH DAKOTA IMPLIED CONSENT LAW IN A SUBSEQUENT CRIMINAL DWI TRIAL IS CONSTITUTIONALLY PROPER.

In 1981, 162 fatal traffic accidents occurred in South Dakota. In 62 percent of these accidents, alcohol was involved. One hundred seventy-seven people were killed in traffic accidents in South Dakota in 1981. Of that number, 110 or 62 percent were fatalities which occurred in alcohol-related accidents. In 1980, 56 percent of the fatal traffic accidents and 54 percent of the traffic fatalities involved a drinking driver.*

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* These statistics are part of the 1981 annual report on alcohol related motor vehicle traffic accidents in South Dakota. This report is prepared by the Office of Accident Records, Division of Highway Safety, South Dakota Department of Public Safety.

The experience in South Dakota with respect to the drinking driver and fatal traffic accidents is no different than the experiences in every other state.

Nearly twenty-five years ago, Justice Clark, in Breithaupt v. Abram, 352 U.S. 432 (1957), discussed the staggering connection between the drunk driver and traffic-related deaths. He stated:

> The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield.

Breithaupt, 352 U.S. at 439. This "slaughter" has not subsided since that time. In Tate v. Short, 401 U.S. 395 (1971) (Blackmun, J., concurring), Justice Blackmun evidenced great concern for the "traffic irresponsibility and the frightful carnage it spews upon our highways." Tate, 401 U.S. at 401 (emphasis added). See also, Mackey v. Montrym, 443 U.S. 1 (1979).

This appeal involves a question relating to the portion of the South Dakota implied consent law dealing with the evidentiary use of the refusal to submit to chemical testing. South Dakota and all the other states use implied consent laws as strong weapons against drunk drivers. If the constitutionality of SDCL 32-23-10.1 is not upheld, vital ammunition in the on-going battle against the drunk driver will be lost.

On July 1, 1980, SDCL 32-23-10.1 became law in the State of South Dakota. The South Dakota statute is similar to those found in many other states. The following states and their statutes are representative of this group:

Alabama (C.A.A., 1980 Supp. § 32-5A-194(c));

Alaska (A.S. § 28-35-03(2)(f));

Arizona (A.R.S. § 26-692(H));

Florida (Fla. Stat. (Supp. 1982) § 316. 1932(c));

Louisiana (L.S.A.-R.S. § 22:666);

Maine (29 M.R.S.A. § 1312.8);

Mississippi (M.C.A. § 63-11-41);

North Carolina (G.S. § 20-139.1(f));

Oregon (O.R.S. § 487.805(4));

Vermont (23 V.S.A. § 1205(a)); and

Wyoming (W.S. § 31-6-105(f)).

In the early evening hours of July 19, 1980, Mason Henry Neville was stopped by city police after having been observed failing to stop for a stop sign. When Neville exited his vehicle, he staggered and fell against his own vehicle to balance himself. The arresting officer smelled the odor of alcoholic beverage on Neville's breath and person. After failing to satisfactorily perform several field sobriety tests, Neville was arrested for DWI. Neville was given the Miranda warnings. He indicated that he understood his rights. He was then informed of the state implied consent provisions and asked to submit to a blood test. Neville refused to submit to the blood test, stating that he was too drunk and would not pass the test. Joint Appendix, pp. 4-5.

Neville argued in state trial court that the use of his refusal to submit as evidence at a subsequent DWI trial, pursuant to SDCL 32-23-10.1, violated his Fifth Amendment privilege against self-incrimination. Both the state trial court and the South Dakota Supreme Court agreed with Neville. In its decision, State v. Neville, 312 N.W.2d 723 (S.D. 1981), the South Dakota Supreme Court found that refusal testimony is "communicative or testimonial," rather than "real or physical." Neville, supra at 726. The court also reaffirmed that a driver has the absolute right, under the South Dakota implied consent law, to refuse to submit to a blood test. Based on that absolute right, the court concluded that "a defendant's exercise of his statutory right to refuse to submit to the blood test cannot be used against him in the prosecution's case in chief." Neville, supra at 726. Finally, the court found that evidence of a driver's refusal to submit to a

blood test is compelled testimony and that it violates the Fifth Amendment's privilege against self-incrimination.

The Supreme Court of the State of South Dakota cited the state court decisions of Dudley v. State, 548 S.W.2d 706 (Tex. Crim. App. 1977); and State v. Andrews, 297 Minn. 260, 212 N.W.2d 863 (1973), cert. denied, 419 U.S. 881 (1974), to support its position. The court also found support in this Court's decision in Schmerber v. California, 384 U.S. 757 (1966). Not only is the court's reliance on these state cases misplaced, but its analysis of Schmerber is incorrect. Because the South Dakota court's reasoning is incorrect, the State argues that the evidentiary process set forth in SDCL 32-23-10.1 is constitutionally permissible.

A. The refusal evidence is relevant in a criminal DWI jury trial.

In the Neville decision, the South Dakota Supreme Court, citing Dudley v. State, supra,

stated that the refusal evidence "is relevant only because it infers that defendant refused to take the blood test because of his fear as to whether he would pass it." Neville, supra at 725-726. By beginning its analysis with that premise, the court necessarily found that SDCL 32-23-10.1 is constitutionally improper. The premise used by the South Dakota court is incorrect and unsupported by the practicalities involved in a prosecution of a driver on a DWI charge.

Chemical testing of bodily substances of a drunk driver to determine the alcohol content of the driver's blood is a process well-known to the general public. The implied consent laws, of which chemical testing is an integral part, were originally a reaction to this Court's decision in Rochin v. California, 342 U.S. 165 (1952). At the time it was announced, Rochin was thought to bar the forcible invasion of the body for seizure of evidence as violative of due process. The fear

in many states was that Rochin invalidated the state statutes authorizing the extraction of blood, urine or other substances to test for alcohol content.

In 1953, the State of New York enacted the prototype implied consent statute. Instead of authorizing physical compulsion to overcome a refusal to submit, this statute authorized the use of a threatened adverse consequence to overcome the refusal. This adverse consequence was the possible suspension of the driver's license. The New York statute and those that followed were seen as a form of non-physical coercion. See generally, State v. Newton, 291 Ore. 788, 636 P.2d 393, 398-401 (1981), for a history of implied consent law in the United States.

Although this Court's decisions in Breithaupt v. Abram, supra and Schmerber v. California, supra, greatly redefined the constitutional limits on coerced blood testing set by the Rochin decision, the concept of implied consent expanded from New York to the other states.

In 1959, implied consent became law in South Dakota. See, SL 1959, ch. 264, § 1; and SDC Supp. 1960 § 44.0302-2. The South Dakota statute was just one more move by the state legislature to help solve the problem of the drinking driver. The South Dakota Supreme Court, in one of its first decisions interpreting the scope of the state implied consent law, looked at the purpose of this statute:

> Implied consent statutes, such as we have, are designed to combat the increasing menace and danger caused by drunken drivers using the public highways . . . . The right to drive being a privilege granted by the state it has, for the protection of the public, imposed conditions on that privilege; one being that a person consent to a chemical analysis under the conditions specified in the statutes . . . .
>
> The threat to person and property from drunken drivers using the public highways is not an area for timid or tolerant application of traffic laws.

Beare v. Smith, 82 S.D. 20, 25-26, 140 N.W.2d 603, 605-606 (1966).

Because of the general public's familiarity with the implied consent process, and the chemical testing requirement therein, if no test results are produced at the driver's jury trial, the jury can infer either that a test was not offered or that a test was given, but that the results were favorable to the driver. If there is no explanation for the lack of test results, the jury can only speculate as to the reason. The State suggests that the refusal evidence is relevant in this explanatory capacity.

In State v. Jackson, ___ Mont. ___, 637 P.2d 1 (1981) (Haswell, C.J., dissenting), cert. pending, Supreme Court Docket No. 81-1531, Chief Justice Haswell, in his dissent, stated the following in support of the relevancy of refusal evidence:

> The State is entitled to show the jury why it produced no scientific evidence of intoxication to counteract the inference that the evidence of intoxication introduced by the State was weak. . . .

> In this sense evidence of refusal is relevant, material and probative on the weight of the evidence introduced by the State, entirely apart from its relevance concerning consciousness of guilt.

Jackson, 637 P.2d at 6. Other state courts have advanced this same reasoning. In State v. Andrews, 297 Minn. 260, 212 N.W.2d 863 (1973) (Peterson, J., dissenting), cert. denied, 419 U.S. 881 (1974), Justice Peterson, in dissent, stated:

> The concept of the implied-consent law had by 1971 been more widely accepted than at the time of its first enactment, with increased public awareness of its routine use. This being so, the legislature could well have intended to avoid a jury's speculating that a chemical test had been given to the defendant but that the absence of any evidence concerning the result indicated that the results were negative.

Andrews, 212 N.W.2d at 867.

The Superior Court of Delaware reached a similar conclusion when it stated:

> [T]he defendant's conduct, demeanor, statements, and attitude are vital evidence of his sobriety and, even if it

> were thought desirable to keep out evidence of a refusal to take a sobriety test, it would be difficult to isolate the test refusal from the other admissible circumstances without distorting the whole truth; it should be told as it was.

State v. Lynch, 274 A.2d 443, 444 (Del. Super. 1971).

The relevancy of the refusal to submit is consistent with the practicalities involved in a DWI prosecution before a jury without a blood test. If test results are not introduced at a DWI jury trial and no information is given to the jury about the driver's refusal to submit, the prosecution begins with a handicap. The jury wonders why the law enforcement officer did not give the driver a blood test. As a practical matter, the fact of a driver's refusal to submit is not usually introduced into evidence with the intent to directly show the driver's guilt. Instead, the refusal evidence is needed to show what in fact occurred: that the arresting officer at least requested that the driver submit to a test, but that the driver refused.

Additionally, if no test results are submitted to the jury, defense counsel argues during final argument that the police did not fully investigate the case. The defense counsel may argue that more field sobriety tests should have been given, or that investigation should have taken place at the bar where the driver was drinking. The implication in this type of argument by defense counsel is not lost on a jury. When no blood test is produced at the trial, the jury must find that no such offer was made. Placing the fact of refusal before the jury fully informs the jury and eliminates false factual findings created by the suppression of such evidence.

Refusal evidence is relevant in a DWI trial for another reason, which is succinctly stated by Chief Justice Haswell in his dissent in State v. Jackson, supra:

> [R]efusal to take a chemical test for intoxication may indicate the defendant's fear of the results of the test and his consciousness of guilt, and if the defendant has some other explanation

> for the refusal, such explanation can be considered by the jury in determining whether the refusal is to be construed as consciousness of guilt. It would appear to me that such evidence could support an inference of consciousness of guilt and that the jury is the proper body to determine what weight should be given such evidence.

Jackson, 637 P.2d at 6 (citations omitted).

This argument in support of relevancy is based on the assumption that refusal evidence is "real or physical" evidence, rather than "communicative or testimonial." The California Supreme Court's seminal decision in People v. Ellis, 65 Cal.2d 529, 55 Cal.Rptr. 385, 421 P.2d 393 (1966), supports this assumption, holding that the introduction of evidence of a defendant's refusal to participate in a voice identification test did not constitute a violation of the defendant's constitutional privilege against self-incrimination. Chief Justice Traynor distinguished between these two types of evidence in the following manner:

> The privilege against self-incrimination applies to evidence of "communications or testimony" of the accused, but not

to "real or physical" evidence derived from him . . . . The results of voice identification tests fall within the category of real or physical evidence . . . . In such a test, the speaker is asked, not to communicate ideas or knowledge of facts, but to engage in the physiological processes necessary to produce a series of articulated sounds, the verbal meanings of which are unimportant . . . .

Even though evidence obtained from a voice identification is not within the privilege against self-incrimination, the question remains whether evidence and comment on a refusal to take such a test is admissible . . . . [The rule prohibiting comment on a defendant's refusal to testify] is not applicable when, as in this case, the defendant has no constitutional right to refuse to speak solely for purposes of voice identification . . . .

Nor was defendant's refusal to "display his voice" itself a testimonial communication. It was circumstantial evidence of consciousness of guilt, and like similar evidence, such as escape from custody . . . false alibi . . . suppression of evidence . . . and failure to respond to accusatory statements when not in police custody . . . its admission does not violate the privilege . . . . A guilty party may prefer not to find himself in a situation where consciousness of guilt may be inferred from his conduct, but it can scarcely be contended that the police, who seek evidence from the test itself, will tend

> to coerce parties into refusing to take tests in order to produce this evidence . . . .
>
> Although conduct indicating consciousness of guilt is often described as an "admission by conduct," such nomenclature should not obscure the fact that guilty conduct is not a testimonial statement of guilt. It is therefore not protected by the Fifth Amendment. By acting like a guilty person, a man does not testify to his guilt but merely exposes himself to the drawing of inferences from circumstantial evidence of his state of mind.

Ellis, 55 Cal. Rptr. at 386-87, 389-90; 421 P.2d at 394-95, 397-98 (citations and footnotes omitted). In a companion case announced the same day, the California Supreme Court extended the Ellis holding by finding no constitutional bar to evidence of and comment on a defendant's refusal to submit to a breathalyzer test for intoxication. People v. Sudduth, 65 Cal.2d 543, 55 Cal. Rptr. 393, 421 P.2d 401 (1967), cert. denied, 389 U.S. 850 (1967).

Many other state courts, having followed Ellis and Sudduth in regard to the characterization of the refusal to submit as "real or physical" evidence, rather than as "testimonial or communicative," have also applied Ellis and Sudduth to uphold the use of the refusal to submit as evidence in subsequent criminal proceedings. See Hill v. State, 366 So.2d 318 (Ala. 1979); Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971); State v. Meints, 189 Neb. 264, 202 N.W.2d 202 (1972); People v. Thomas, 46 N.Y.2d 100, 412 N.Y.S.2d 845, 385 N.E.2d 584 (1978), appeal dismissed, 444 U.S. 891 (1979); City of Westerville v. Cunningham, 15 Ohio St.2d 121, 239 N.E.2d 40 (1968); and Commonwealth v. Robinson, 229 Pa.Super. 131, 324 A.2d 441 (1974). In his dissent in Neville, Chief Justice Wollman also found that refusal evidence is "real or physical" evidence, which is outside the scope of the Fifth

Amendment. In reaching this conclusion, he stated:

> [I]t is hardly realistic to say that a defendant's refusal to submit to a chemical test may be the exercise of his statutory right to refuse the test rather than the manifestation of consciousness of guilt. While the former may in a rare case be true, the latter is the far more likely situation.

Neville, supra at 729.

The refusal to submit to chemical testing is relevant evidence in a DWI trial. The question presented in this appeal is an evidence question. The South Dakota Legislature understood this when it enacted SDCL 32-23-10.1. The addition of SDCL 19-13-28.1, which is part of the South Dakota Rules of Evidence and makes a motorist's refusal to submit to a chemical test of intoxication admissible as evidence in a DWI trial makes this clear. Rule 102 of the Federal Rules of Evidence sets forth the purpose of the Rules in the following manner:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and

> delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined. (Emphasis added.)

The request to submit and the refusal to submit are factual; they are events which occur shortly after the arrest of a driver for DWI. The suppression of both the fact of the request and the fact of the refusal eliminates that evidence from the review by the jury. The jury is not aided in its search for the truth by blotting out a portion of the transaction. The suppression forces the arresting officer to tell less than "the whole truth." The suppression of the facts of request and refusal misleads the jury during its deliberations. The relevance of such evidence is clear.

B. The self-incrimination protections of the Fifth Amendment are inapplicable to the evidentiary use of the refusal to submit.

Not all relevant evidence is admissible at trial. Sometimes evidence must be suppressed because it was obtained in violation of certain

rights or privileges guaranteed by the Constitution. The question in this appeal focuses on the privilege against self-incrimination found in the Fifth Amendment. Based on this Court's decision in Schmerber v. California, supra, the Fifth Amendment self-incrimination protection is inapplicable to the evidentiary use of the refusal to submit, which is allowed by SDCL 32-23-10.1.

In Schmerber, this Court held that even compelled withdrawal of blood from a defendant for chemical analysis does not constitute evidence of a testimonial or communicative nature. The Fifth Amendment privilege against self-incrimination was not violated by the procedure. A defendant does not have a federal constitutional right to refuse to take a blood test. Schmerber, 384 U.S. at 765.

At footnote 9 in Schmerber, this Court stated that incriminating evidence resulting from the refusal to submit to an alcohol test may be "an unavoidable by-product of the compulsion to

take the test." The Court continued with the following warning:

> If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forego the advantage of any testimonial products of administering the test--products which would fall within the privilege. (Emphasis in original).

Finally, the Court concluded that "general Fifth Amendment principles, rather than the particular holding of Griffin [v. California, 380 U.S. 609 (1965)], would be applicable" to the introduction of refusal evidence and comments made by the prosecutor in closing argument upon the driver's refusal. Schmerber, 384 U.S. at 765-66, n. 9.

The rationale from Griffin v. California is inapplicable to involuntary chemical testing because such testing is outside the scope of the protections of the Fifth Amendment. The California Supreme Court, in People v. Sudduth, supra, addressed general Fifth Amendment issues when it distinguished Griffin v. California:

> The sole rationale for the rule against comment on a failure to testify is that such a rule is a necessary protection for the exercise of the underlying privilege for remaining silent. A wrongful refusal to cooperate with law enforcement officers does not qualify for such protection. A refusal that might operate to suppress evidence of intoxication, which disappears rapidly with the passage of time, should not be encouraged as a device to escape prosecution.

Sudduth, 55 Cal. Rptr. at 395; 421 P.2d at 403.

Schmerber is based on the conclusion that the refusal is not testimonial in nature. The protections set forth in this Court's decisions in Doyle v. Ohio, 426 U.S. 610 (1976); Miranda v. Arizona, 394 U.S. 436 (1966); and Griffin v. California, supra, are all triggered by acts which are testimonial or communicative in nature. These decisions do not find that silence or a refusal to speak is testimonial or communicative in nature. The use of "real or physical" evidence, rather than evidence that is "testimonial or communicative" in nature, and which may be incriminating,

is proper. See, United States v. Dionisio, 410 U.S. 1 (1973); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967); and Schmerber v. California, supra.

Just as the principles found in Griffin are inapplicable to a review of the propriety of using a refusal to submit as evidence, the principles from Doyle and Miranda are equally inapplicable because of the differences between the factual situation presented in this appeal and those decisions. In those decisions, comment on the defendant's refusal to speak was found to burden the right to remain silent. Because a driver has no constitutional right to refuse to submit to the blood test, the evidentiary use of the refusal does not burden any constitutional rights.

The inapplicability of general Fifth Amendment principles to the situation presented in this appeal is discussed in two federal court decisions which deal specifically with admissibility of refusal

evidence. In Newhouse v. Misterly, 415 F.2d 514 (9th Cir. 1969), cert. denied, 397 U.S. 966 (1970), the court interpreted footnote 9 of Schmerber in the following manner:

> [T]he two portions of the Schmerber footnote indicate that a refusal to take a blood test is not a testimonial "statement" within the Fifth Amendment; rather, it is best described as conduct indicating a consciousness of guilt. Nonetheless, the reference to the Miranda footnote can be read to imply that where an underlying right to refuse such a blood test is present, it would be improper to draw adverse inferences from failure of the accused to respond to a request for a blood test because the accused would thereby be penalized for exercising his rights to refuse the test.

Newhouse, supra at 518 (citations omitted). Because California drivers had no constitutional or statutory right to refuse to submit, the second part of the Schmerber footnote did not apply. The court concluded that no constitutional provision bars the use of the refusal to submit as evidence. Newhouse, supra at 518.

In Welch v. District County Court, 594 F.2d 903 (2nd Cir. 1979), the court applied its holding in United States v. Wolfish, 525 F.2d 457 (2nd Cir. 1975) (per curiam), cert. denied, 423 U.S. 1059 (1976), to the factual situation involving the refusal to submit to chemical testing. In Wolfish, the court found that it was not error to admit evidence of the defendant's refusal to cooperate in giving handwriting exemplar, including efforts to disguise his handwriting in the exemplar. In concluding that Wolfish was not distinguishable, the Welch court stated:

> [T]he refusal to cooperate in Wolfish included not only a refusal to follow directions, as is the case here, but also an effort to falsify evidence. There is no reason to believe that our decision in Wolfish would have been different had only the former aspect of the refusal to cooperate been present.

Welch, supra at 904-905. The Welch court concluded that no constitutional rights of the driver had been violated by using his refusal to submit

to chemical testing as evidence. In reaching that conclusion, the court stated:

> [T]here is nothing unconstitutional in the manner in which Vermont has chosen to condition its statutory right to refuse. The statute does not compel a driver refusing to take the test to surrender any constitutional right. It is merely an explicit recognition of the practical existence of situations that might develop where a driver simply will not cooperate even though required to by state law, such as resort by the police to force in an effort to obtain the physical evidence to which they are entitled.

Welch, supra at 905 (emphasis added).

These decisions all emphasize that there is no constitutional right to refuse to submit to chemical testing. As both the Misterly and Welch courts pointed out, because there is no constitutional right to refuse, any testimony about the refusal to submit does not burden a constitutionally protected right. No constitutional provision prohibits such testimony.

C. The South Dakota Legislature may provide for evidentiary use of the refusal to submit as a condition on a driver's power to refuse to submit to chemical testing.

1. The power to refuse to submit to chemical testing.

Because general Fifth Amendment principles are inapplicable to the evidentiary use of the refusal to submit, the next step leading to a solution to the question raised in this appeal is a review of the "right" to refuse created by the South Dakota implied consent law. Three recent decisions of the South Dakcta Supreme Court have enunciated this "absolute right" to refuse. Neville, supra at 726; State v. Buckingham, 90 S.D. 198, 204, 240 N.W.2d 84, 87 (1976); and State v. Oswald, 90 S.D. 342, 346, 241 N.W.2d 566, 569 (1976).

Regardless of the statements made by the South Dakota Supreme Court as to the existence of such an "absolute right," there is no constitutional "right" to refuse to submit to a chemical test in South Dakota. What actually exists is a statutory power to refuse to submit to the physical act of intrusion upon the driver's body. To

call such a power to refuse a "right" to refuse is a misnomer. This incorrect labeling clouds the issue of whether the fact of refusal can be used as evidence in a subsequent criminal trial. By correctly denominating the statutory power to refuse as a power rather than a right, the admissibility of the refusal as evidence is clearly proper.

South Dakota's implied consent law, SDCL 32-23-10 through SDCL 32-23-12, involves a statutory scheme in which a person using the public highways impliedly consents to a chemical test of his blood, urine, breath or other bodily substance when lawfully arrested for DWI. The statutes also provide for procedures to revoke a person's driver's license for one year in the event the driver refuses to submit to such a test. As Chief Justice Haswell observed in Jackson, supra:

> This type of statute provides for mandatory consent with a freedom of refusal to prevent unseemly struggles that are

> likely to arise when police and citizens fail to appreciate the import of a common purpose. An act of this type does not contemplate a per se right of refusal, but rather an acquiescence in refusal in the posture of avoiding violent conflict . . . .
>
> Acts of this type do not grant a right of refusal since they exact a penalty for refusal in the form of suspension of the person's driver's license.

Jackson, 637 P.2d at 9.

Several other courts have also recognized the distinction between the "power" to refuse and a "right" to refuse. In State v. Duke, 378 So.2d 96 (Fla. App. 1979), the District Court of Appeal of Florida upheld the constitutionality of the use of the refusal to submit as evidence in subsequent criminal proceedings. The court's decision rested, in large part, on the distinction between the concepts of "consent" and "withdrawal of implied consent." In making that distinction, the court stated:

> The [implied consent] statute should be construed to evidence legislative recognition of consent under the first portion

of the statute as being a legal fiction. A driver retains the physical power to refuse a sobriety test but not the legal right to withdraw his implied consent . . . .

Public policy considerations favor the physical power/legal right distinction. If [the implied consent statute] is concluded not to be compulsory, the driver who refused the test is penalized only by the suspension of his license for three months. However, the driver who takes the test faces a greater penalty as the results could be evidence against him at trial. This noncompulsory interpretation would lead to drivers not taking the test.

The physical power/legal right dichotomy was recognized by the Arizona Supreme Court in Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971).

The Arizona Supreme Court found [the Arizona implied consent statute] did not give the driver a legal right to refuse a sobriety test; it merely evidenced legislative recognition that he had a physical power to refuse to submit. The court found the reason for the provisions prohibiting the taking of a sobriety test over the objection of an offending driver was to avoid violence which often attended forcible tests upon "recalcitrant inebriates."

Duke, supra at 98. See also, Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685, 692 (1971); State v. Newton, 291 Ore. 788, 636 P.2d 393, 397-402 (1981); Bush v. Bright, 264 Cal. App. 2d 788, 71 Cal. Rptr. 123, 125 (1968); People v. Paddock, 29 N.Y.2d 504, 323 N.Y.S.2d 976, 272 N.E.2d 486, 487 (1971) (Jason, J., concurring); and State v. Neville, supra, (Wollman, C.J., dissenting).

Because the "right" to refuse created by the South Dakota implied consent statute is actually a statutory power to refuse, and because there is no constitutional requirement that either a power or a right to refuse be provided for in statute, any claim made by Neville that the use of the refusal to submit to a blood test as evidence infringes on a right to refuse is without merit.

2. The legislative power to control drunk drivers.

Having defined the statutory "power" to refuse which has been granted to South Dakota

drivers, the next step in the analysis of the evidentiary use of the refusal to submit, as provided for in SDCL 32-23-10.1, is to review the scope of the legislative power to control drunk drivers.

Most states have chosen, through legislative action, to prohibit physically forced chemical testing of its citizens who have been arrested for DWI. Freedom from physically coerced submission to chemical testing does not create a constitutional or statutory "right" to refuse to submit. Such freedom does not give the driver the freedom to refuse to submit and then keep this fact from the jury. State legislatures have made an important policy decision by enacting implied consent statutes. The choices presented to a legislature are clear: require the taking of blood for testing in every case, with no option for the driver to refuse to submit; or provide for the refusal to submit, with the consequences of such refusal being the loss of driving privileges as well as the

evidentiary use of the refusal at the DWI trial. Although the first choice is constitutionally permissible, the second choice has been chosen in order to avoid physical violence. The battle against drunk drivers is reaching a breaking point. If the states are constitutionally limited in the consequences which they can place on the refusal to submit, the state legislatures may be forced to change their present policy and require blood testing of every driver suspected of drunk driving.

The State contends that the legislature can place conditions on a driver's power to refuse to submit to a blood test. In South Dakota, the legislature has already placed one condition on the power to refuse by providing for the possible revocation of a driver's license for one year if the driver refuses to submit to any type of chemical testing. See SDCL 32-23-11. Such revocations are constitutionally permissible. Mackey v. Montrym, supra. SDCL 32-23-10.1 is

simply one other condition. It is also constitutionally permissible.

In State v. Brean, 136 Vt. 147, 385 A.2d 1085 (1978), the Supreme Court of Vermont reviewed a similar statutory situation, and, in concluding that the admission of refusal evidence is proper, made the following observations:

> The Legislature undoubtedly could not engraft a condition upon a constitutional right that would, in effect, penalize the exercise of that right. Defendant seems to argue that the admission of any refusal evidence constitutes a penalty on the exercise of his privilege against self-incrimination. The problem with defendant's argument, however, is that he had no constitutional right, either state or federal, to refuse to take the test.
>
> The right to refuse to submit to a blood or breath test in Vermont is a creature of statute and not the Federal or State Constitutions. Since the Vermont Legislature has deemed fit to grant suspected intoxicated drivers more "protection" than is constitutionally required, the proper question is not, as defendant suggests, whether refusal evidence is testimonial or communicative in nature and thereby protected by the cloak of the Fifth Amendment, but rather whether the Legislature possesses the power to place a condition

> upon the grant of a statutory right. We think it eminently clear that it does. Since the right to refuse to submit to the test is a matter of legislative grace or privilege, the Legislature may properly condition the exercise of that right by providing that any refusal may be introduced as evidence in a criminal proceeding.

Brean, 385 A.2d at 1088 (citations omitted, emphasis added). The Brean decision was reaffirmed in State v. Welch, 136 Vt. 442, 394 A.2d 1115 (1978).

Chief Justice Wollman, in his dissent in Neville, relied on the reasoning from Brean as an alternate holding to support his belief that the provision made in SDCL 32-23-10.1 for the evidentiary use of the refusal to submit in a criminal trial is constitutionally permissible. Using Brean, Chief Justice Wollman reached the following conclusion about South Dakota's implied consent statute:

> As we said in State v. Buckingham, 90 S.D. 198, 204, 240 N.W.2d 84, 87 (1976), "Implicit in our implied consent statute, however, is the right to refuse to submit to a test and, a fortiori, the

> requirement that a choice be made between submitting to the test or suffering the consequences of such refusal." One of the consequences of such refusal is to make the fact of such refusal admissible in evidence at the subsequent trial. To that extent, then, there is no "absolute right" under state law to refuse to submit to a chemical test, if by that term it is argued that no adverse consequences may flow from the exercise of such right. Indeed, in view of the fact that one of the consequences of the refusal to submit to a chemical test is the revocation of one's driver's license, it is a contradiction in terms to characterize the right of refusal as "absolute."

Neville, supra at 729 (footnote omitted).

D. The weight of authority from state and lower federal courts supports the state's argument.

Many state courts have concluded that the refusal to submit to chemical testing may be used as evidence in a subsequent criminal proceeding. The State submits that these decisions, although dealing with many types of chemical testing of bodily substances, are equally applicable to the present situation involving the blood test. Many of these decisions are based on an application of Schmerber to the fact of refusal to submit to chemical testing.

A recent example of these decisions is State v. Gardner, 52 Ore. App. 663, 629 P.2d 412 (1981). The Gardner court was faced with the question of whether the refusal was a constitutionally valid piece of evidence in a DWI trial. Oregon has not only a statute similar to SDCL 32-23-10.1, but also a similar "power" to refuse to submit. The court stated:

> The Fifth Amendment against self-incrimination only protects an accused "from being compelled to testify against [herself], or otherwise provide the state with evidence of a testimonial or communicative nature ***." Schmerber v. California, 384 U.S. 757, 761, 86 S.Ct. 1826, 1830, 16 L.Ed.2d 908 (1966). In Schmerber, the court concluded that the withdrawal of blood over the defendant's objection and the use of its analysis at trial did not violate the accused's Fifth Amendment rights. As the court stated, the blood test evidence "was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner ***." Id., at 765, 86 S.Ct. at 1832. The same conclusions apply to breathalyzer evidence.
>
> Because a person's breath constitutes real or physical evidence rather than testimonial or communicative evidence, a

> person under arrest has no constitutional right to refuse to take a breath test. Welch v. District Court of Vermont, Unit, Etc., 594 F.2d 903, 904 (2nd Cir. 1979). On that basis, the majority of courts considering the issue have concluded that the introduction of evidence of a defendant's refusal to take a sobriety test in the form of a blood or breath test does not violate his or her right against self-incrimination.

Gardner, 629 P.2d at 416 (citations omitted). This conclusion was reaffirmed in City of Portland v. Stanley, 53 Ore. App. 254, 631 P.2d 826 (1981), cert. denied, ___ U.S. ___, 102 S.Ct. 1457, 71 L.Ed.2d 668 (1982). See also, State v. Dugas, 252 La. 345, 211 So.2d 285 (1968), cert. denied, 393 U.S. 1048 (1969); State v. Flannery, 31 N.C. App. 617, 230 S.E.2d 603 (1976); State v. Smith, 230 S.C. 164, 94 S.E.2d 886 (1956), aff'd, State v. Miller, 257 S.C. 213, 185 S.E.2d 359 (1971); State v. Albright, 98 Wis.2d 663, 298 N.W.2d 196 (1980); State v. Holt, 261 Iowa 1089, 156 N.W.2d 884 (1968); Newhouse v. Misterly, supra; Welch v. District County Court, supra; and the state court decisions cited at pages 27-28 of this brief.

All of the state and federal court decisions cited by the State which uphold the constitutionality of the use of refusal evidence in subsequent criminal proceedings are consistent with both the holding from this Court's decision in Schmerber, and with logic. Based on an analysis consistent with Schmerber, no evidentiary or constitutional distinction exists between the characteristics of the results of a blood test and the refusal to take the same test. Therefore, the use of both the compelled test results and the use of the fact of refusal as evidence is constitutionally permissible.

CONCLUSION

The evidentiary use of a driver's refusal to submit to a blood test requested under the South Dakota implied consent law in a subsequent criminal DWI trial is constitutionally proper. The refusal evidence is relevant evidence in a driver's DWI trial. The refusal evidence eliminates any

misconceptions by the jury caused by the suppression of such evidence. The refusal is also relevant as evidence of consciousness of guilt.

The use of a coerced blood test as evidence violates no rights or privileges granted by the Fifth Amendment. This Court's decisions in Schmerber v. California, supra, and other Fifth Amendment decisions distinguish "real or physical" evidence from "testimonial or communicative" evidence. Because the blood test and the refusal to submit are pieces of "real or physical" evidence, rather than evidence which is "testimonial or communicative" in nature, the Fifth Amendment self-incrimination protections are inapplicable.

A decision upholding the South Dakota Supreme Court will require the overturning of the principles enunciated in Schmerber.

The Constitution does not grant to a driver the right to refuse to submit to a blood test. A driver is given a statutory "power" to refuse by the legislature. The state legislature is free to

place conditions on the power to refuse to submit. The South Dakota legislature has created such conditions in SDCL 32-23-10.1.

Based on the foregoing arguments and authorities, the State of South Dakota respectfully requests that this Court reverse the decision of the Supreme Court of the State of South Dakota and find that SDCL 32-23-10.1 does not violate the United States Constitution.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
AUG 30 1982
STEVAS
CLERK

NO. 81-1453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF SOUTH DAKOTA,

Petitioner,

v.

MASON HENRY NEVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH DAKOTA

BRIEF OF RESPONDENT

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v.

MASON HENRY NEVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH DAKOTA

BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

Pursuant to Rule 34.2 of the Rules of United States Supreme Court, Respondent agrees with the question presented for review, citations to the opinions and judgments delivered in the Courts below, jurisdictional statement and the constitutional provisions and statutes involved in this case as set forth in Petitioner's brief, and as a consequence, adopts the same.

STATEMENT OF THE CASE

The Defendant, Mason Henry Neville, hereinafter called Neville, was arrested in Lake County, South Dakota on July 19, 1980 for the crime of driving under the influence of alcohol. (J.A.-7) The arrest took place after Neville failed to stop at a stop sign and had been given a number of field sobriety tests by the arresting officer. (J.A.-6,7) Neville was then advised of his South Dakota Implied Consent Rights that the officer was utilizing at that time. (J.A.-9) This was done immediately subsequent to Neville being advised of his Miranda warnings. (J.A.-8)

After being read the Implied Consent Rights, the officer testified that Neville stated "I'm too drunk, I won't pass the test." (J.A.-10) Immediately thereafter he was again read the Implied Consent Rights. (J.A.-10) Neville was then taken to the police station where he was read the Implied Consent Rights for a third time and according to the arresting officer, he stated "I'm too drunk, I won't pass the test." (J.A.-11)

The 1980 South Dakota Legislature enacted what is now SDCL 32-23-10.1 which became effective July 1, 1980.

This statute generally provided that if an individual refused, pursuant to his statutory right, to take a blood test, that refusal could be utilized as evidence against him at trial.

Subsequent to his arrest, counsel for the Defendant made a Motion to Suppress the evidence of this refusal at trial. (App. to Pet. A24, 25) A hearing was held before the Honorable Marshall Gerken, Circuit Court Judge in the State of South Dakota on September 17, 1980 and Judge Gerken suppressed any and all evidence of the Defendant's refusal to submit to a blood alcohol test on the grounds that:

1. SDCL 32-23-10.1 was unconstitutional.
2. That prior to requesting the blood test, the officer failed in conjunction with the Implied Consent Rights to advise the Defendant of the fact that his refusal to take the blood test could be used against him at trial and that he had the right to consult with an attorney in making that decision.
3. The Defendant's refusal was irrelevant to any of the issues before the trier of fact. (App. to Pet. A-31, 32)

Subsequent to Judge Gerken's decision the State of South Dakota petitioned for an intermediate appeal to the South Dakota Supreme Court on the constitutional issues involved in trial Court's decision. (App. to Pet. A-31-38) The South Dakota Supreme Court affirmed the decision of the trial court on the constitutional issue by finding that Neville's Fifth Amendment privilege against self-incrimination was violated by SDCL 32-23-10.1. (App. to Pet. A1-23)

The State of South Dakota filed its Petition for Writ of Certiorari on February 1, 1982 for review of the decision of the South Dakota Supreme Court and the petition was granted on May 17, 1982.

SUMMARY OF ARGUMENT

SDCL 33-23-10.1 and similar statutes are unconstitutional in that they are a deprivation of the Fifth Amendment protection against selfincrimination. The refusal in the form of an oral response to a request for a blood test involved in this case is a testimonial or communicative response which is coerced, or at the very least, compelled by the requesting law enforcement officer and is not real or physical evidence. The admission of this testimony amounts to the compulsion of the Defendant in a criminal case to be a witness against himself.

The Fifth Amendment of the Constitution of the United States generally allows a Defendant not to make any statements that could be constituted as testimony against himself. SDCL 32-23-10 provided that a Defendant has the right to refuse a blood test when arrested for DWI. It does not follow that the statutory granting of this right of refusal grants the State the right to use the words, statements or responses in connection with the refusal as testimony by an individual against himself. This is what SDCL 32-23-10.1 allows and the same is violative of the Fifth Amendment.

Schmerber v. California, 384 US 757 (1966) provides for the introduction of real or physical evidence as not being within the Fifth Amendment protections; however, *Schmerber* cautions that for the State to have such rights, testimonial by-products may well not be included. *Schmerber* thus can be construed as stating that the use of real or physical evidence is not an absolute right, but a right existent only when protected rights in connection with the procedures utilized are not abused.

The State of South Dakota now seeks to render admissible testimonial by-products referred to in *Schmerber.* The same

constitutes a surgical removal of the backbone of Fifth Amendment protections. Although the driver may have no constitutional right to refuse a blood test he certainly has a right to not be compelled to give testimony against himself. A statute that compels a testimonial comment or action is proper; however, if the State enacts such a statute, the State must give up the right to introduce that testimonial comment or action under the Fifth Amendment.

ARGUMENTS AND AUTHORITIES

THE EVIDENTIARY USE OF THE REFUSAL TO SUBMIT TO A BLOOD TEST REQUIRED PURSUANT TO THE SOUTH DAKOTA IMPLIED CONSENT LAW IN A SUBSEQUENT CRIMINAL DWI TRIAL IS CONSTITUTIONALLY IMPROPER.

A.

THE EVIDENTIARY USE OF THE REFUSAL TO SUBMIT TO A BLOOD TEST IS COMMUNICATIVE OR TESTIMONIAL IN NATURE AND AS SUCH IS VIOLATIVE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

South Dakota, like many states, has provided by statute that someone arrested and accused of the crime of driving while under the influence of alcohol (DWI) has the right to refuse a blood test. This statutory scheme provides that by operating a motor vehicle in the state, the individual shall be deemed to have given his consent to the analysis. SDCL 32-

23-10. The statute does, however, allow the individual the right to refuse such an analysis, and if such a refusal takes place, he stands the risk of the loss of driving privileges for one year subsequent to the statutorily permitted administrative appeals. SDCL 32-23-11. There is the requirement in SDCL 32-23-10 that all of these rights be explained to an individual prior to the making of his decision, a statutory requirement that also was not complied with in this case. (J.A.-21) The 1980 South Dakota Legislature enacted SDCL 32-23-10.1 which permitted the introduction of the refusal by the person at trial.

The South Dakota Supreme Court in *State v. Neville,* 312 NW2d 723 (S.D., 1981) held properly that this statute was unconstitutional. In so deciding, the South Dakota Supreme Court interpreted the differentiation embodied in *Schmerber v. California,* Supra, between real and physical evidence and testimonial and communicative evidence as establishing a constitutional prohibition against such testimony and as a result found SDCL 32-23-10.1 unconstitutional.

In interpreting whether or not a statute and procedures pursuant to that statute are violative of the Fifth Amendment, the dictate of *Counselman v. Hitchcock,* 142 US 547 (1892) and *Feldman v. United States,* 322 US 487 (1944) that the Fifth Amendment "must be accorded liberal construction in favor of the right it was intended to secure" is applicable. Also applicable is the reasoning for the Fifth Amendment as stated by Justice Clark in *Hoffman v. United States,* 341 US 479 (1951) where it was stated in regard to the Fifth Amendment that

> "It was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its containment, other social objects of free society should not be sacrificed."

In *Schmerber v. California,* Supra, the Court was faced with the issue as to whether the compulsion to take a blood sample compelled the petitioner to be a witness against himself in violation of the Fifth Amendment of the United States Constitution as interpreted in *Miranda v. Arizona,* 394 US 436 (1966). The decision in *Schmerber* held that such a blood test was not barred by the Fifth Amendment stating that:

> "We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature. . . ."

Thus the Court in *Schmerber* established definitively that a compulsion that makes a suspect or accused the source of real or physical evidence does not violate the Fifth Amendment but reiterated the established Fifth Amendment prohibition against compelling communication or testimony. The *Schmerber* decision also recognized the possible merger of the real-physical versus communicative-testimonial differentiation in the same factual situation. This was set forth in the following often quoted footnote in *Schmerber v. California,* Supra:

> "This conclusion would not necessarily govern had the State tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposed it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forego the advantage of any testimonial products of administering the test-products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to

> prefer confession to undergoing the 'search', and nothing we say today should be taken as establishing a permissibility of compulsion in that case."

This previously quoted footnote from *Schmerber,* although indicating that the issue could not be specifically decided in *Schmerber,* established a strong warning to States such as South Dakota, that put the various states on notice that "if you desire to statutorily compel the taking of real and physical evidence you will have to forego the utilization of resultant incriminating or testimonial by-products of that compulsion."

The South Dakota Supreme Court in *State v. Neville,* Supra, utilizing the express wording of *Schmerber* properly determined that a refusal to take a blood test was testimonial and communicative testimony, and also concluded that the above referred to footnote was at the very least a warning that even though there is no Fifth Amendment violation involved in the taking of blood samples, the State or government can not use this Fifth Amendment privilege to create, establish, and use testimonial or communicative evidence as a direct result of the enforcement of their right under *Schmerber v. California,* Supra.

As stated, the South Dakota Supreme Court in *State v. Neville,* Supra, correctly applied *Schmerber.* Other Courts, creating the division between the various states relating to this issue, have applied an erroneous and non-existent meaning to *Schmerber.* In *Newhouse v. Misterly,* 415 F.2d 514 (C.A. 9, 1966) the Court following the decision of *People v. Ellis,* 1966, 65 Cal.2d 529, 55 Cal. Rptr. 385, 421 P.2d 393, reached the conclusion that a portion of the Schmerber footnote indicated that the refusal to take a blood test was not testimonial. Such a determination is reading something into *Schmerber* which is non-existent. However,

the Court in *Newhouse v. Misterly,* Supra, concluded that the *Schmerber* footnote did consider a refusal to be testamentary where there was a statutory right to refuse, which statutory right is present in this case and was not present in California at that time.

Many of the State Courts finding contrary to the South Dakota Supreme Court decision in *State v. Neville,* Supra, equate evidence of refusal to evidence of flight, escape or false alibi. *People v. Ellis,* Supra. Such an equasion is not proper. In reaching such an analysis the Courts ignore that the refusal or acquiescence testimonial by-products are compelled, while such compulsion is not present when dealing with flight, escape or false alibi. *State v. Jackson,* 637 P.2d 1 (Montana, 1981)

The determination of the differentiation between real-physical evidence, and testimonial or communicative evidence is much simpler than the Courts attempting to avoid the dictates of *Schmerber* would lead one to believe. There has been a constant realization that actual statements, the substance of which are used, are protected by the Fifth Amendment, while evidence within the physical body of a person is not protected by the Fifth Amendment. *United States v. Dionisio,* 410 US 1 (1973) held in connection with compelling a voice test that

> "The voice recordings were to be used solely to measure the physical properties of the witness's voices, not for the testimonial or communicative content of what was to be said."

The State here claims that the evidence is not communicative, however, their only interest is the evidentiary utilization of the communicative content of the result of the compelled response, whether the same be oral or by action, against the Defendant in attempting to prove his guilt. The fact that an

individual by statement, actions or silence conveys a non-acquiescence to the blood test is communicative. The desired evidence is generally in the nature of "I refuse", which may be less incriminatory, but no less communicative than the statement "I did it".

The differentiation in *Dionosio* and *Schmerber* has also been established in *California v. Byers,* 402 US 424 (1971), *Gilbert v. California,* 388 US 263 (1967), *United States v. Wade,* 388 US 218 (1967) and *Holt v. United States,* 218 US 245 (1910) where Justice Holmes in recognizing the distinction stated:

> "The prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications, from him, not an exclusion of his body as evidence when it may be material."

The State in contending that SDCL 32-23-10.1 is constitutional proposes exactly what Justice Holmes stated was not available under the Fifth Amendment, that being the allowed use of evidence obtained by the use of physical or moral compulsion to extort a communication.

Miranda v. Arizona, Supra, delineates the Fifth Amendment right to remain silent, and prohibits the use of compulsion to secure a response, rendering any response in connection with such a prohibited procedure inadmissible. The State argues that the right to refuse is not a constitutional right, but rather, a statutorily created right and as a consequence, the refusal does not obtain Fifth Amendment protections. What the State conveniently ignores is that although there is no constitutional right to have the opportunity to refuse, there certainly is the right not to be compelled to make any statements in connection with the blood test which could subsequently be utilized against an

individual at trial. The refusal claimed admissible by the State, as would generally be the situation, took place within the setting of a custodial interrogation. SDCL 32-23-10.1 allows the use of a communication obtained in a custodial situation which communication is certainly compelled by statute. The Fifth Amendment prohibition relating to utilized testimonial by-products of a refusal, also, although not an issue herein, prohibits the utilization of testimonial by-products secured in connection with an acquiescence to a blood test. There is no difference. The State being allowed to compel a response must as a result give up the right to use the response. Under the facts of this case the statements of the Defendant were as the direct result of the statement by the law enforcement officer "Do you wish to submit to the chemical test I have requested?" (J.A.-10) The response was made immediately, after which the Defendant was again read his Implied Consent Rights. (J.A.-10) The police procedures utilized here involved the reading of the South Dakota Implied Consent Rights on three separate occasions. The utilization of such procedures is indicative of the type of abuse of the Fifth Amendment that SDCL 32-23-10.1 and similar statutes can create. If the State's position is upheld, this would appear to open up to law enforcement officers the utilization of these rights to obtain testimonial by-products with no real limitation on the number of times and the variance of responses that could be obtained by the State. Theoretically, if the State's position were followed, a law enforcement officer under the procedures utilized in this case, could attempt this compulsion as many times as he deemed necessary until he obtained a refusal he felt was more incriminatory than previous responses and advantageous to the State's case at trial.

Schmerber v. California, Supra, establishes the right to

take a blood test; however, it does not establish the right to obtain oral testimony from the Defendant, nor does it grant the State the right to use his silence relating to the exercising of a statutory or constitutional right against him. The use of post-arrest silence can and does constitute a due process violation. *Doyle v. Ohio,* 426 US 610 (1976). Even though the right to take the blood test is present, the Defendant still has the constitutional privilege to say nothing. This privilege extends not only to inquisition but to casual conversation and the utilization of such refusal along with the utilization of statements made when such is compelled is constitutionally infirm. *Griffin v. California,* 380 US 609 (1965), *Miranda v. Arizona,* Supra.

B.

SDCL 32-23-10.1 AND SIMILAR STATUTES ARE NOT NECESSARY FOR LEGISLATIVE ENFORCEMENT OF DWI STATUTES.

An unconstitutional statute is not rendered any less unconstitutional by the fact that it may be of assistance to prosecutors; however, the State claims great credence in their argument that such statutes are necessary to enforce the laws against and convict the so-called drunk drivers. The State ignores that there are many remedies available to the various legislatures which are constitutional and which would help solve the problem relating to the drunken driver, many of which have been ignored by the legislature in South Dakota, or to the contrary have been liberalized. The following are all examples of where the South Dakota Legislature has established laws which lead to an increase in

drinking drivers, or where the Legislature has not taken available and proper steps to assist in solving the problem. In 1972 the age to purchase low-point beer was reduced by the South Dakota Legislature. SDCL 35-9-4. See S.L. 1972, Ch. 154, §20. In 1971 the hours and days that an on-sale establishment could serve alcoholic beverages was extended by the South Dakota Legislature. SDCL 35-4-81. See S.L. 1971, Ch. 211, §72. The number of liquor licenses available was liberalized by the South Dakota Legislature in 1982, SDCL 35-4-10. 35-4-11, and SDCL 35-4-11.1, and the South Dakota Legislature, despite decisions of the South Dakota Supreme Court that the same must be a legislative act, has failed and refused to enact any dram shop legislation within the State of South Dakota. *Griffin v. Sevek*, 245 NW2d 481 (S.D., 1976) If there is a strong desire by the prosecutors and the South Dakota Legislature to take actions to curb the drunken driver, the previously mentioned legislative areas all exist where steps could be taken that are constitutionally proper.

Likewise, the State's argument that evidence of a Defendant's refusal to take a test is absolutely necessary to overcome the tendancy of juries to acquit because they do not know that a blood test had been offered and refused. This argument is not supported by any facts in the State's brief and can only be concluded to be extreme speculation. In a DWI case, other than virtually any other type of case, the State has the distinct advantage of having no other witnesses present other than a law enforcement officer. There is no reason why the State, if the law enforcement officer testifies as to all of the heinous observations generally made by him in connection with a DWI arrest, cannot convict an individual of driving while intoxicated, if he actually is intoxicated, without the utilization of blood tests. (J.A.-6, 7) The

presumption claimed by the State that juries presume no test was offered when none is admitted, certainly is no different than a possible presumption that an individual was not interviewed when a Defendant exercised his Miranda rights and would not talk to an arresting officer, however, such a utilization by an individual of his rights under *Miranda* is not admissible, *Doyle v. Ohio,* Supra, and prosecutors have seemed to survive admirably with such prohibition. See also *State v. Andrews,* 212 NW2d 863 (Minn., 1973), cert. denied 419 U.S. 881 (1974).

The State and Amicus argue that such jury speculation is the reason for the disproportionately low rate of convictions DWI cases; however, a more realistic reason for the lower conviction rate, if one does exist, is poor law enforcement techniques, over zealous law enforcement, or the fact that in a DWI case, unlike a homicide or burglary case, virtually every jury will contain jurors who have committed, though undetected, the very crime with which the Defendant stands accused.

The State in connection with these arguments is apparently claiming that Fifth Amendment rights should be circumvented or ignored because of the danger of the drinking driver. It is contended that the State has the ability to fully and adequately prosecute DWI charges without SDCL 32-23-10.1 and as pointed out herein, if additional assistance is needed, the State has constitutionally permissible procedures to aid them in this regard. The South Dakota Supreme Court in *State v. Oswald,* 241 NW2d 566 (S.D., 1976) recognized the fact that improper procedures should not be used to curb the drunken driver, when it stated:

> ". . . we are in agreement with Mr. Chief Justice Traynor when he observed that in a day when excessive loss of life and property is caused by inebriated drivers,

an imperative need exists for a fair, efficient, and accurate system of detection, enforcement and, hence, prosecution. *People v. Sudduth,* 1966 65 Cal.2d 543, 55 Cal. Rptr. 393, 421 P.2d 401. Nevertheless, our system of justice demands that to achieve these ends Courts cannot dispense with the fundamentals of fairness for the accused."

C.

MINORITY AUTHORITY FROM STATE COURTS ESTABLISH A PROPER ASSESSMENT OF THE LAW.

It is conceded that a majority of the State Courts have determined contrary to the decision of the South Dakota Supreme Court in *State v. Neville,* Supra. However, it is contended that the number of minority states is substantial and that the cases decided in those states are supported by better logic and a proper analysis of the Fifth Amendment rights involved.

Dudley v. State, 548 SW2d 706 (Tex., 1977) held similarily to the South Dakota Supreme Court in *State v. Neville,* Supra, in interpreting *Schmerber* and did so correctly and with well-reasoned efficiency. The fact that the evidence to be admitted is communicative was established in *Dudley v. State,* Supra, and in so deciding, stated:

"If a communication, written, oral or otherwise involves an accused's consciousness of the facts and the operations of his mind in expressing it, such is testimonial and communicative in nature. A Defendant's silence or negative reply to a demand or request by an officer made upon him while under the necessary

> compulsion attendant with custodial arrest, which demand or question reasonably calls for an immediate reply by the Defendant, is clearly a tacit or overt expression and a communication of the Defendant's thoughts in regard thereto."

The State has argued in its brief that the evidence of refusal is evidence of a consciousness of guilt and as a consequence, is real or physical evidence; however, *Dudley v. State,* Supra, correctly analyzes the utilization of a refusal from such an evidentiary purpose as being without a doubt communicative and testimonial in character and certainly not factual proof of an existing physical characteristic, such as a blood test, physical observation or a fingerprint. Similar decisions have been reached in *Gay v. City of Orlando,* 202 So.2d 896, (Florida, 1967), *People v. Thomas,* 385 NE2d 584 (New York, 1978), *State v. Andrews,* Supra, and *State v. Jackson,* 637 P.2d 1 (Montana, 1981).

The reasoning that the State utilizes that the refusal shows a consciousness of guilt is not necessarily the only reason for refusal as recognized by a series of Courts. *State v. Paschal,* 117 SE2d 749 (North Carolina, 1961), *State v. Adams,* 247 SE2d 475 (West Virginia, 1978), *Engler v. State,* 316 P.2d 625 (Oklahoma, 1957), *City of Columbus v. Mullins,* 123 NE2d 422 (Ohio, 1954), *Hovious v. Riley,* 403 SW2d 17 (Kentucky, 1966), *State v. Jackson,* Supra. The same realization was also made by this Court in *Schmerber v. California,* Supra. Yet if any of these reasons given by these cases do exist, under the State's theory, and under the statute involved herein, the Defendant would be forced to take the stand to explain a perfectly legitimate reason for the refusal of the test, thus shifting the burden of proof as to the exercise of a statutory right of the Defendant. If the evidence of the refusal does show a consciousness of guilt as the State

argues, the State is basically contending that the statements, compelled, are what show this consciousness of guilt, which is no different that the indication in a confession taken outside the safeguards of *Miranda v. Arizona,* Supra, of a consciousness of guilt. The Fifth Amendment privilege, "while sometimes a shelter to the guilty, is often a protection to the innocent." *Murphy v. Waterfront Commission of New York Harbor,* 378 US 52 (1964).

CONCLUSION

The use of the refusal to take a blood test by the driver herein at trial, is not constitutionally proper.

It has already been determined at the trial Court level that the same is irrelevant and immaterial, however, the issue before this Court is whether the statute is constitutional.

The response by the Defendant was compelled and coerced. As a consequence, the statements given by the Defendant were communicative and testimonial, and protected under the Fifth Amendment of the United States Constitution. The same are not real or physical evidence, but are testimonial and communicative.

Contrary to the State's conclusion, a reversal of the decision of the South Dakota Supreme Court will require the overturning of the principals enunciated in *Schmerber v. California,* Supra.

The refusal of the Defendant, compelled by the law enforcement officers, while in custody, and under arrest, is the securing of testimonial evidence. This is one of the rights that the State cannot constitutionally have when granted the right to secure real and physical evidence.

Based on the foregoing arguments and authorities, and the facts of this particular case, the Respondent, Mason Henry Neville, respectfully requests the Court to affirm the decision of the Supreme Court of South Dakota and find that SDCL 32-23-10.1 violates the Fifth Amendment of the United States Constitution.

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Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
NOV 30 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1453

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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Petitioner,

v.

MASON HENRY NEVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH DAKOTA

REPLY BRIEF OF PETITIONER

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ARGUMENTS AND AUTHORITIES

THE EVIDENTIARY USE OF THE REFUSAL TO SUBMIT TO A BLOOD TEST REQUESTED PURSUANT TO THE SOUTH DAKOTA IMPLIED CONSENT LAW IN A SUBSEQUENT CRIMINAL DWI TRIAL IS CONSTITUTIONALLY PROPER.

Throughout his brief, Respondent Mason Henry Neville, hereinafter referred to as "Neville," makes arguments which are based upon both a faulty reading of the applicable decisions of this Court and an incorrect interpretation of the form of the evidence of refusal contemplated by SDCL 32-23-10.1. These fallacies in Neville's analysis are closely connected.

Like the South Dakota Supreme Court, Neville seizes upon the differentiation made in Schmerber v. California, 384 U.S. 757 (1966), between "testimonial or communicative" evidence and "real or physical" evidence, yet incorrectly characterizes the refusal evidence as "testimonial or communicative." See, South Dakota v. Neville, 312 N.W.2d 723, 726 (S.D. 1981), cert. granted, ___ U.S. ___, 102 S.Ct. 2232, 72 L.Ed.2d 844 (1982). Using such a characterization of the refusal evidence, the warnings found in footnote 9 of Schmerber, concerning the testimonial by-products of the blood test, are clearly applicable.

The defect in Neville's argument lies in the initial characterization of the evidence of refusal as "testimonial or communicative."

Neville argues that the refusal evidence is testimonial or communicative. This argument is not supported by either the nature of the evidence or the method in which the evidence is to be used. The evidence is not testimonial, but rather is evidence which is "real or physical" in nature. If the purpose of the Fifth Amendment is to safeguard individuals from choosing between contempt, self-incrimination or perjury, then neither the blood test nor the refusal to submit to the blood test violates this purpose. The Fifth Amendment protections are not burdened when the evidence to be introduced is neither related to a communicative act nor used for the testimonial content of what is said. The Fifth Amendment's self-incrimination protections do not prohibit the use of refusal evidence.

A. The evidence of refusal is "real or physical" evidence outside the protections of the Fifth Amendment.

1. Like the evidence of the refusal to submit to the gathering of other forms of "real or physical" evidence, which is constitutionally admissible at trial, the evidence of the refusal to submit to a blood test is constitutionally admissible in a subsequent criminal DWI trial.

After Schmerber, it is clear that blood samples and the testing to determine the alcohol content in the blood are to be characterized as "real or physical" evidence. Similarities exist between blood testing, which is characterized as "real or physical" evidence, and handwriting samples, voice exemplars and lineups, which are also characterized as "real or physical" evidence. Evidence of the refusal to submit to the gathering of these other forms of "real or physical" evidence is constitutionally admissible. See, People v. Ellis, 65 Cal.2d 529, 55 Cal.Rptr. 385, 421 P.2d 393 (1966); People v. Sudduth, 65 Cal.2d

543, 55 Cal.Rptr. 393, 421 P.2d 401 (1967), cert. denied, 389 U.S. 850 (1967); Welch v. District County Court, 594 F.2d 903 (2nd Cir. 1979); and United States v. Wolfish, 525 F.2d 457 (2nd Cir. 1975) (per curiam), cert. denied, 423 U.S. 1059 (1976). The interpretation and analysis suggested by Neville is clearly at odds with the decisions which support the constitutionality of the admissibility of the refusal to submit to the gathering of "real or physical" evidence. No valid reason exists to support the differentiation between refusals to allow blood testing and refusals to submit to a handwriting sample or any other form of "real or physical" evidence.

2. Evidence of the refusal to submit to a blood test is constitutionally admissible as circumstantial evidence of consciousness of guilt.

As "real or physical" evidence, the refusal evidence is best characterized as circumstantial evidence of consciousness of guilt. Chief Justice

Traynor of the California Supreme Court, in People v. Ellis, supra, sets forth a cogent analysis of refusal evidence in general as circumstantial evidence of consciousness of guilt. This analysis is as applicable to the refusal to submit to blood testing as it is to flight, destruction of evidence or false alibi. In each of these situations, the evidence is constitutionally admissible. In fact, because the refusal to submit to a blood test is the intentional destruction of evidence, such refusal falls clearly within the ambit of the consciousness of guilt analysis made by Chief Justice Traynor.

The bottom line in Chief Justice Traynor's analysis of consciousness of guilt evidence is simple: this type of evidence is not "testimonial or communicative." As Chief Justice Traynor stated:

> By acting like a guilty person, a man does not testify to his guilt but merely exposes himself to the drawing of inferences from the circumstantial evidence of his state of mind.

Ellis, 55 Cal.Rptr. at 389-390, 421 P.2d at 397-398. Chief Justice Wollman, in his dissent in the court below, also found support for the admissibility of the refusal in the consciousness of guilt analysis. Neville, supra at 727-728. Neville contends that equating other types of circumstantial evidence of guilt with the refusal to submit is improper. Because the admissibility of this consciousness of guilt analysis of refusal evidence is based on solid Fifth Amendment principles, this argument has no merit.

As circumstantial evidence of consciousness of guilt, the fact of refusal can be used by the trier of fact to infer guilt. This type of evidence is not conclusive evidence of guilt; therefore, the accused may explain the reasons for his conduct. Nevertheless, Neville suggests that the use of the consciousness of guilt analysis to support the evidentiary use of the refusal forces the accused

to take the stand to explain a legitimate reason for refusal. This, according to Neville, is an improper shifting of the burden of proof. The circumstantial evidence of consciousness of guilt analysis, however, does not shift the State's burden of proof. The refusal to submit to a blood test is simply one more circumstance to be considered by the trier of fact. It is not conclusive evidence of guilt. If there is another reason for the accused's refusal, the accused has the burden to come forward with such evidence. The State, of course, still has the burden of proving the elements of the criminal offense beyond a reasonable doubt. See, City of Westerville v. Cunningham, 15 Ohio St.2d 121, 239 N.E.2d 40 (1968).

3. The refusal to submit to a blood test is a "verbal act," which does not fall within the Fifth Amendment's self-incrimination protections.

Any potential Fifth Amendment problems created by the use of the actual words spoken by

the accused during the refusal are avoided when the refusal is viewed as a verbal act. As is set forth above, footnote 9 in Schmerber dealt with the "testimonial by-products" of the refusal to submit. There are no such "by-products" if the verbal act analysis is used. Similar to the statement offered to establish that the statement was made and not for the truth of the matter asserted, which is a statement not falling within the scope of the Hearsay Rule, the verbal act (evidence of the refusal to submit to a blood test) is offered only to establish the fact that the refusal took place.

a. SDCL 32-23-10.1 contemplates the use of the fact of refusal and not the actual words spoken during the refusal.

The verbal act analysis eliminates many of the arguments raised by Neville in his brief. In several parts of his brief, Neville's arguments are based on the assumption that the actual words of refusal are to be used in the DWI jury trial. The

introduction of the actual words of the refusal is not the goal of SDCL 32-23-10.1. By placing the fact of refusal before the jury, the fact-finding purpose of SDCL 32-23-10.1 has been satisfied. The fact of refusal informs the jury that the arresting officer at least requested that the driver submit to a test, but that the driver refused to comply with this request.

Neville contends that by using the State's argument, a law enforcement officer could make several requests that a blood test be taken in order to obtain the most incriminatory refusal. This argument again ignores the use for which the refusal is used and the manner in which it is placed before the jury. Under SDCL 32-23-10.1, the State relies on the fact of refusal rather than the actual statements made during the refusal to submit. Using this method of describing the verbal act of refusal, any Fifth Amendment problems are eliminated.

Neville also argues that, although this Court's decision in Schmerber establishes the right for the State to compel a blood test, it does not establish the right for the State to compel oral testimony in the form of the refusal to submit to chemical testing. The refusal, however, is not oral testimony; it is a verbal act. As a verbal act, the refusal is not subject to Fifth Amendment constraints. It is not the words of refusal but rather the fact of refusal which is used by the State pursuant to SDCL 32-23-10.1.

b. The verbal act of refusal is not a statement for Fifth Amendment purposes.

The evidence of a refusal can be introduced by the description of the verbal act, rather than by introducing the words actually spoken. Because the verbal act of refusal is offered only to establish that the verbal act occurred, it makes no assertion. Therefore, the refusal is not testimonial and is not a statement. Under such an analysis, the Fifth Amendment arguments raised

by Neville are inapplicable to the refusal as evidence question. See, Miranda v. Arizona, 384 U.S. 436, 444 (1966); Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980).

Neville argues that while there is no constitutional right to have the opportunity to refuse, there is a right not to be compelled to make statements in connection with the blood test. As a verbal act, however, the evidence of refusal makes no assertion. Therefore, the refusal cannot be considered either testimonial or a statement within the meaning of the Fifth Amendment.

Neville also suggests that Fifth Amendment principles forbid the use of refusal evidence because the refusal takes place during a custodial interrogation. This argument is incorrect, for the request to submit to chemical testing is not an interrogation. See, Miranda v. Arizona, supra; Rhode Island v. Innis, supra. As indicated above, the response to the request, whether

in the form of a submission to the test or a refusal, is not a statement. The Fifth Amendment's self-incrimination protections do not apply to the use of evidence of the refusal to submit to a blood test.

4. The state court decisions relied on by Neville to support his argument incorrectly characterize the evidence of refusal as "testimonial or communicative," rather than as "real or physical."

Neville relies on the following state court decisions to support his argument: Dudley v. State, 548 S.W.2d 706 (Tex. Crim. App. 1977); State v. Andrews, 297 Minn. 260, 212 N.W.2d 863 (1973), cert. denied, 419 U.S. 881 (1974); and State v. Jackson, ___ Mont. ___, 637 P.2d 1 (1981), cert. pending, Supreme Court Docket No. 81-1531. The South Dakota Supreme Court also relied on these decisions. Neville, supra at 726. Such reliance is misplaced. These decisions all rely on the characterization of the refusal to submit as testimonial. The preceding argument

by the State illustrates the error in such a characterization.

The minority authority from the various state courts, which deal with the question presented in this appeal, ignores the non-testimonial nature of the verbal act of refusal. They all conclude that a refusal is testimonial and communicative, when in reality, the refusal is "real or physical" evidence, which is outside of the protections found in the Fifth Amendment.

C. The evidence of the refusal to submit to a blood test is relevant evidence in a DWI jury trial.

The State's initial brief included an extended discussion of the relevancy of the refusal evidence. Neville claims that the State is urging this Court to ignore certain Fifth Amendment rights because of the problems associated with the drinking driver. The State has never claimed that the Fifth Amendment should be ignored in the name of protecting the public from the menace

of the drunk driver, even though such protection is sorely needed; the Fifth Amendment is simply inapplicable.

The relevancy discussion in the State's initial brief illustrates the error in the assumption made by the South Dakota Supreme Court that the "refusal to submit to a blood test is relevant only because it infers that defendant refused to take the blood test because of his fear as to whether he would pass it." Neville, supra at 725-726. This assumption is too narrow. In addition to being circumstantial evidence of the consciousness of guilt, the refusal to submit is also relevant, as is set forth in detail in the State's initial brief, for the purpose of "show[ing] the jury why [the State] produced no scientific evidence of intoxication to counteract the inference that the evidence of intoxication introduced by the State was weak." Jackson, 637 P.2d at 6. (Haswell, C.J., dissenting).

D. The South Dakota Legislature may provide for the evidentiary use of the refusal to submit to a blood test as a proper condition upon a driver's power to refuse to submit to the blood test.

Introduction of the refusal to submit does not burden any rights possessed by the accused. There is no constitutional right to refuse to submit. Any state statutory "right" to refuse is merely an extension of the implied consent law. It is more accurate to state that a driver has the physical power to refuse to submit. This power to refuse eliminates the need to force blood tests from uncooperative drivers. See, State v. Duke, 378 So.2d 96, 98 (Fla. App. 1979); Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685, 692 (1971); and State v. Newton, 291 Ore. 788, 636 P.2d 393, 397-402 (1981).

Because the evidentiary use of the refusal to submit is not proscribed by the Fifth Amendment's self-incrimination protections, it follows that the admissibility is governed by state law or

procedure. A state legislature may place proper conditions on the power to refuse. See, State v. Brean, 136 Vt. 147, 385 A.2d 1085 (1978). The South Dakota Legislature has placed two such conditions on a South Dakota driver's power to refuse. If a driver refuses to submit, his license may be suspended for up to one year. SDCL 32-23-11. In addition, the evidence of the fact of refusal may be used in a subsequent trial for DWI. SDCL 32-23-10.1. The creation of such conditions is a constitutionally proper legislative function.

CONCLUSION

Based on the foregoing arguments and authorities, and on the arguments and authorities presented in its initial brief, the State of South Dakota respectfully requests that this Court reverse the decision of the South Dakota Supreme

Court and find that SDCL 32-23-10.1 does not violate any provisions of the United States Constitution.

Respectfully submitted,

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Office - Supreme Court, U.S.
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Respondent

BRIEF ON THE MERITS IN SUPPORT OF PETITIONER SUBMITTED AMICUS CURIAE BY THE STATE OF INDIANA, JOINED BY ALABAMA, ALASKA, FLORIDA, HAWAII, ILLINOIS, KANSAS, LOUISIANA, MAINE, MINNESOTA, MISSOURI, MONTANA, NEW YORK, NORTH CAROLINA, OHIO, OREGON, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, VERMONT, VIRGIN ISLANDS, WEST VIRGINIA, WISCONSIN, AND WYOMING

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No. 81-1453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF SOUTH DAKOTA,
Petitioner

v.

MASON HENRY NEVILLE,
Respondent

BRIEF ON THE MERITS IN SUPPORT OF PETITIONER SUBMITTED AMICUS CURIAE BY THE STATE OF INDIANA, JOINED BY ALABAMA, ALASKA, FLORIDA, HAWAII, ILLINOIS, KANSAS, LOUISIANA, MAINE, MINNESOTA, MISSOURI, MONTANA, NEW YORK, NORTH CAROLINA, OHIO, OREGON, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, VERMONT, VIRGIN ISLANDS, WEST VIRGINIA, WISCONSIN, AND WYOMING

OPINION BELOW

The opinion of the Supreme Court of South Dakota is reported as *State of South Dakota v. Mason Henry Neville*, (1981), ___ S.D. ___, 312 N.W.2d 723.

JURISDICTION

This Court has jurisdiction to review this cause by writ of certiorari pursuant to 28 U.S.C., section 1257(3), and has accepted it for such purposes by granting said writ on May 17, 1982.

CONSENT OF THE PARTIES

Pursuant to Rule 36(4) of the Rules of this Court the consent of the parties is not required since the brief of *amici* is filed by Attorneys General of different States of the United States.

QUESTION PRESENTED

Whether the South Dakota Supreme Court erred when it held that evidence of an accuseds' refusal to take a blood test violates the federal privilege against self-incrimination.

CONSTITUTIONAL PROVIION INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; or shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

INTEREST OF THE AMICI

The State of Indiana submits this brief for itself and twenty three joining state since the question presented by

the State of South Dakota in this case is equally vital to all joining states. Indeed the Supreme Court of Indiana decided that it is not error to admit evidence of a refusal to take a drunkometer test in the case of *Alldredge v. State* (1959), 239 Ind. 256, 156 N.E. 2d 888.

We also believe that permitting a driver's refusal to take a sobriety test to be used as evidence against him is not inconsistent with the privilege against self-incrimination.

Moreover it is important to protect the public from the death and destruction caused by persons driving while intoxicated.

The State of Alabama joins in this brief since the Supreme Court of Alabama has held that evidence of a defendant's refusal to submit to a chemical test for intoxication was relevant to the issue of intoxication and therefore admissable. See *Hill v. Alabama*, (1979), ___ Ala. ___ 366 So.2d 318.

The State of Alaska joins in this brief as its Supreme Court in the case of *Puller v. Municipality of Anchorage*, (1978), ___ Alaska ___, 574 P.2d 1285 held that the refusal to take a blood test is not admissible in evidence.

The legislature in 1980 passed a law making the refusal to take a sobriety test admissible in evidence against the person refusing such test. Alaska Statutes, Section 28.35.033, subsections a and e.

The State of Florida joins in this brief since the Second District Court of Appeals in *State v. Duke*, (1979), ___ Fla. App. ___, 378 So.2d 96 held that the refusal to take the test is admissible in evidence.

The State of Hawaii joins in this brief since Hawaii has a statute which prohibits the admission into evidence of the

refusal to submit to a breath or blood test in any civil or criminal proceeding.

The State of Illinois joins in this brief since the Supreme Court of Illinois in the case of *People v. Boyd*, (1974), ___ Ill. ___, 309 N.E.2d 29 held that the refusal to take the test is not admissible in evidence.

The State of Kansas joins in this brief since its Court of Appeals in the case of *State v. Wilson*, (1980), ___ Kansas ___, 613 P.2d 384 held that the refusal to take a sobriety test is not admissible in evidence.

The State of Louisiana joins in this brief since its Supreme Court upheld a statute making the refusal to take a test admissible in evidence in the case of *State v. Dugas*, (1968), 252 La. 345, 211 So.2d 285, *cert. denied* 393 U.S. 1048.

The State of Maine joins in this brief since the Maine Revised Statute, section 29-1312.8, specifically provides that the refusal to submit to a chemical test to determine intoxication is admissible at trial.

The State of Minnesota joins in this brief since its Supreme Court in the case of *State v. Andrews*, (1973), 297 Minn. 260, 212 N.W.2d 863, *cert. denied*, 419 U.S. 881 held that the refusal to take a test is not admissible at trial.

The State of Missouri joins in this brief since its Supreme Court in the case of *City of St. Joseph v. Johnson*, (1976) ___ Mo. ___, 539 S.W.2d 784 held that the refusal to take a test is not admissible into evidence at trial.

The State of Montana joins in this brief since its Supreme Court held the refusal to take a test inadmissible in evidence in the case of *State v. Jackson*, (1981), ___ Mont. ___, 637 P.2d 1, *cert. pending*, Supreme Court of the United States (Filed February 12, 1982).

The State of New York joins in this brief, noting that the Court of Appeals of New York in the case of *People v.*

Thomas, (1978), 46 N.Y.2d 100, 385 N.E.2d 584, appeal dismissed 444 U.S. 891 held that the introduction of evidence of defendants' refusal to submit to a chemical test to determine the alcoholic content of blood did not violate defendant's privilege against self-incrimination.

The State of North Carolina joins in this brief since the Court of Appeals of North Carolina in the case of *State v. Flannery*, (1976), 31 N.C. App. 617, 230 S.E.2d 604 allowed the admission into evidence of the refusal to submit to a chemical test to determine intoxication.

The State of Ohio joins in this brief since its Supreme Court in the case of *City of Westerville v. Cunningham*, (1968), 15 Ohio St. 2d 121, 239 N.E.2d 40 held that the refusal to take a sobriety test is admissible in evidence.

The State of Oregon joins in this brief since the Supreme Court of Oregon has decided that the refusal to take a test is admissible in evidence in the case of *State v. Gardner*, (1981), 520 OR. App. 663, 629 P.2d 412.

The State of Pennsylvania joins in this brief since its Supreme Court held that the refusal to take a chemical test for sobriety was not admissible in evidence in the case of *Commonwealth v. Charles*, (1979), 270 Pa.Super. 280, 411 A.2d 527.

The State of South Carolina joins in this brief since the Supreme Court of South Carolina in the case of *State v. Miller*, (1971), ___ S.C. ___, 185 S.E.2d 359 allowed the admission into evidence of the refusal to submit to a chemical test to determine intoxication.

The State of Tennessee joins in this brief since its Supreme Court in the case of *Crowley v. State*, (1967), ___ Tenn. ___, 413 S.W.2d 370 held that the refusal to take a blood test is not admissible in evidence.

The State of Vermont joins in this brief since the Supreme Court of Vermont held that the refusal to take a blood test is admissible in evidence in the case of *State v. Welch*, (1978), 136 Vt. 442, 394 A.2d 1115.

The State of West Virginia joins in this brief since its Supreme Court in the case of *State v. Adams*, (1978), ___ W. Va. ___, 247 S.E.2d 475 held that the refusal to take a test is not admissible in evidence.

The State of Wisconsin joins in this brief since the Court of Appeals of Wisconsin in the case of *State v. Albright*, (1980), ___ Wis. ___, 298 N.W.2d 196 held that the refusal to submit to a chemical test to determine intoxication was admissible and constitutionally permissible.

The State of Wyoming joins in this brief since the Wyoming Statute, section 31-6-105(f), specifically provides that the refusal to submit to a chemical test to determine intoxication is admissible at trial.

SUMMARY OF ARGUMENT

The states may properly require that the operator of a motor vehicle shall be deemed to have consented to the taking of a test to determine sobriety when there is reason to believe that the driver is under the influence of alcohol or drugs.

As this Court has held, the right of a driver to refuse to take such a test is not a constitutional right.

Moreover, the taking of such a test does not constitute the giving of testimony since there is no constitutional right to refuse to take such a test, the refusal to take such a test is admissible in evidence and does not violate the fifth amendment privilege against self-incrimination, at least so long as the driver has been reasonably warned of the consequences of such a refusal.

While there is a division of authority among the highest courts of the states we are convinced that the better view is that the admission into evidence of a driver's refusal to permit a sobriety test to be taken is constitutionally permissible. Accordingly, the decision below should be reversed.

ARGUMENT

EVIDENCE OF THE REFUSAL TO TAKE A TEST TO DETERMINE THE BLOOD ALCOHOL CONTENT OF A DEFENDANT FOR INTOXICATION SHOULD BE ADMISSIBLE IN EVIDENCE AS NOT VIOLATIVE OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

This review arose from the case of *South Dakota v. Neville, supra,* wherein the Supreme Court of South Dakota held that evidence of an accused's refusal to take a blood test violated the federal and state privilege against self-incrimination and held the statute which made the refusal admissible as evidence unconstitutional.

This Court has already decided in the case of *Schmerber v. California,* (1966) 384 U.S. 757 that the withdrawal of blood from a defendant for a chemical analysis to determine intoxication did not constitute evidence of a testimonial or communicative nature and such was not violative of the Fifth Amendment privilege against self-incrimination. Since a defendant can be compelled to take a test to determine intoxication it follows that he has no constitutional right to refuse to take such a test. This Court and most State Courts have long held that the Fifth Amendment offers no protection against compulsion to submit to fingerprinting, photographing or measurements, imprinting of portions of suspect's body, to write or to speak for identification, to appear in court, to stand, to grow a beard or long hair, to assume a stance, to walk, or to make a particular gesture. See cases collected in 8 Wigmore, Evidence (McNaughton) section 2265. The privilege applies only to testimonial compulsion or enforced communication.

By the same token, the evidence resulting from a sobriety test is not testimonial since there is no constitutional right to refuse to take the test, it follows, we believe, that there is no bar to the admission into evidence of the fact that the test

was refused at least when the driver has been reasonably warned of the consequences of such refusal. The basis for this conclusion is well illustrated by the decision of the Court of Appeals of New York in the case of *People v. Thomas, supra* that upheld a section of the New York Vehicle and Traffic Law which provides for the admission of evidence of a defendant's refusal to submit to a chemical test to determine the alcohol content of his blood. The Court explained as follows:

> "Quite a different situation is presented however when the prosecution offers evidence of the defendant's refusal to submit to a blood alcohol test. In no way in such a circumstance is there any compulsion on the defendant to *refuse* to take the test—the conduct which is the subject of the challenged evidence; on the contrary, the compulsion is to *take* the test. Submission to the test, not its evasion, was what was desired by the police officers in this case and, before them, by the Legislature in the enactment of section 1194 of the Vehicle and Traffic Law, embodying as it did two penalties or adverse consequences of refusal—license revocation and disclosure of refusal in a prosecution for operating a vehicle while under the influence of alcohol or drugs. As an alternative to refusal, defendant had a legitimate option available to him, the choice of which would have involved no forfeiture of a constitutional privilege or a statutory right—i.e., he could have submitted to the chemical test offered to him *(Schmerber v. California*, 384 U.S. 757, *supra*, 86 S.Ct. 1826, 16 L.Ed.2d 908). Before making his determination as to which course to follow, defendant was informed, as the statute required that he be, 'in clear and unequivocal language' of the effect of a refusal. The choice whether to take the test or to refuse was entirely his, as the statute makes clear. Under the procedure prescribed by section 1194 of the Vehicle and Traffic Law a driver who has initially declined to take one of the described chemical tests is to be informed of the consequences of such refusal. If he

> thereafter persists in a refusal the test is not to be given (§1194, subd. 2); the choice is the driver's. With the advice at hand, this defendant chose to persist in his refusal, incurring the statutory consequences attendant thereon, apparently satisfied that his interests would thereby be better served than by risking disclosure of whatever the test might have revealed as to the alcoholic content of his blood."

The Supreme Court of Alabama in the case of *Hill v. State, supra*, upheld the Alabama Chemical Test for Intoxication Act in the following language:

> "Therefore, we hold that the refusal to submit to a chemical test for intoxication is not a compelled testimonial communication and the admission of evidence of refusal and comment thereon does not violate the accused's privilege against self-incrimination."

The North Carolina legislature has passed a statute making the refusal to take a chemical test to measure blood alcohol by a person under arrest for operating a motor vehicle while under the influence of alcoholic beverages admissible in any criminal proceeding arising out of acts alleged to have been committed while the person was driving or operating a vehicle while under the influence.

North Carolina General Statutes, section 20-139.1(f). This statute was approved by the Court of Appeals of North Carolina in the case of *State v. Flannery, supra.*

The State of South Carolina approved the admission into evidence of the refusal to take a sobriety test in the case of *State v. Miller, supra*, in the following language:

> "In *State v. Smith*, 230 S.C. 164, 94 S.E.2d 886 (1956), we rejected the claim that the admission of testimony that the defendant, when charged with driving under the influence, refused to submit to a blood test, and the allowance of comment thereon before the jury, violated defendant's privilege against self-incrimination.*****Suffice it to say that we find nothing which

> impugns our judgment in *Smith*. We adhere to this decision which is in accord with the great weight of authority on the point."

The Supreme Court of the State of Louisiana has upheld the admission into evidence of the refusal to submit to a blood test in the case of *State v. Dugas, supra*, in the following language:

> "Contrary to the contention of the defendant, we perceive no constitutional bar to the admission of such evidence. The Fifth Amendment is silent as to 'compulsion' which makes a suspect or accused the source of real or physical evidence. *Schmerber v. California, supra*. Since such bodily evidence violates no privilege against self-incrimination, neither does testimony of a refusal to give bodily evidence violate that privilege."

Vermont in the case of *State v. Welch, supra*, held that the defendant's refusal to consent to a breath test was not compelled testimonial communication and its admission into evidence did not violate his privilege against self-incrimination.

The State of Wisconsin has upheld the right to admit into evidence the refusal to take a breath test for sobriety in the case of *State v. Albright, supra*.

The State of Wyoming has a statute making the refusal admissible being Wyoming Statutes (1977), Section 31-6-105(f) which reads as follows:

> "If a person under arrest refuses to submit to a chemical test under provisions of this act, evidence of such refusal shall be admissible in any administrative, civil or criminal action or proceeding arising out of acts alleged to have been committing while the arrested person was driving or in actual physical control of a motor vehicle while under the influence of intoxication liquor, to a degree which rendered him incapable of safely operating said motor vehicle."

The State of Maine also has a statute making the refusal admissible being 29 Maine Revised Statutes (R. 1981-82 Supp.) section 1312.8 which in part reads as follows:

> "The revocation of a person's implied consent to a chemical test by refusing to allow the taking of a sample specimen as authorized by this section shall be admissible in evidence on the issue of whether that person was under the influence of intoxicating liquor."

The Court of Appeals of Oregon held that the refusal to take a breathalyzer test is admissible in the case of *State v. Gardner, supra.*

The District Court of Appeal of Florida held the refusal to submit to a breathalyzer test is admissible in *State v. Duke, supra.*

The State of Hawaii has a statute which prohibits the admission of the failure to submit to a blood or breath test in a criminal proceeding. Hawaii Revised Statutes, section 286-159 which reads as follows:

> "If a legally arrested person refuses to submit to a test of his breath or blood, proof of refusal shall be admissible only in a hearing unders section 286-156 and shall not be admissible in any other action or proceeding, whether civil or criminal."

The Supreme Court of Ohio in the case of *City of Westerville v. Cunningham, supra,* held the refusal to submit to a test admissible as follows:

> "Hence, we conclude that the admission of evidence, that one accused of intoxication refused to take a reasonably reliable chemical test for intoxication, and comments on such report by counsel do not violate any constitutional privilege against self-incrimination."

The State of Indiana does not have a law making the refusal to take a sobriety test admissible in evidence but such is approved by case law. In the case of *Alldrege v. State, supra,* the Supreme Court of Indiana held:

> "Evidence given, not by the accused as a witness on the stand, but by another witness who observed his conduct, demeanor, mental condition and statements when arrested or when accused, is admissible and competent evidence.
>
> We hold that there was no error in the admission of the evidence of a refusal to take a drunkometer test where there is no evidence to show such a test would involve a physical invasion of the accused's body, which amounts to a violation of due process."

Indiana has no reported case concerning the admissibility into evidence of a refusal to take a blood test to determine sobriety.

We believe that these cases are soundly based and that the admission into evidence of a driver's refusal to take a sobriety test should be sustained as not being violative of the privilege against self-incrimination.

CONCLUSION

The use of test refusal evidence for the purpose of showing consciousness of guilt is constitutionally permissible since a defendant can be compelled to take a test to determine intoxication. The only rationale for a rule prohibiting comment on a refusal to take a test would be that there is a right to refuse to take the test. There is no constitutional right to refuse to take a breath or blood test for sobriety as such tests are not self-incriminating and are

not protected by the fifth amendment to the United States Constitution. The evidence obtained is not testimony or evidence relating to a communicative act. See *Schmerber, supra.*

We urge this Court to reverse the decision of the Supreme Court of South Dakota and find section 32-23-10.1 of the laws of South Dakota constitutional.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
JUN 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1453

IN THE

Supreme Court of the United States

October Term, 1982

STATE OF SOUTH DAKOTA, *Petitioner,*

vs.

MASON HENRY NEVILLE, *Respondent.*

On Writ of Certiorari To The Supreme Court of South Dakota.

Brief of Amicus Curiae, Mothers Against Drunk Drivers, Inc. In Support of Petitioner

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I

I.

INTEREST OF AMICUS CURIAE

Amicus Curiae, Mothers Against Drunk Drivers, Inc. ("MADD"), is a non-profit corporation dedicated to educating the public about the dangers posed by drunk drivers in an effort to reduce the accidents these impaired drivers cause. MADD's prime tenet is that a public which is aware of the senseless slaughter taking place on its highways will not permit it to continue. MADD believes that heightened awareness will lead the public to demand efforts by state and federal governments to identify and treat drunk drivers and, when identification and treatment fail, to provide for strict enforcement of laws against drunk driving and stiff penalties when they are violated.

Amicus MADD believes that affirmance of the South Dakota Supreme Court's decision will have devastating consequences. Breathalyzer tests are a quick, painless method of determining blood alcohol levels; their results are virtually free from the subjective bias of the arresting officer. If a suspect may refuse to take a breathalyzer test and that refusal is automatically excluded from evidence, use of the breathalyzer will simply disappear. The State will be deprived of this enforcement tool; it will be forced, once again, to rely on subjective observations. Prohibiting use of the test is a disservice to the suspect, the public and the numberless injured whom drunk drivers may beget in the future. *Amicus* respectfully requests to be heard on their behalf.

II

SUMMARY OF ARGUMENT

The Supreme Court of South Dakota struck down a statute providing that a refusal to take a breathalyzer test was admissible at trial on the grounds that the introduction of such evidence violates the Fifth Amendment's privilege against self-incrimination. *Amicus* disagrees with the analysis employed as well as the result.

This court has held that the privilege against self-incrimination has no application to evidence which is not testimonial. Conduct and verbal acts (conduct which consists of words) are not testimonial, for the actor intends no statement when engaging in conduct. A refusal to take a breathalyzer test is a verbal act — conduct

— which is not testimonial and, therefore, its introduction does not violate the privilege against self-incrimination. Given this fact, so long as the state introduces evidence which only describes or summarizes the verbal act, *i.e.*, "the suspect refused to take the test," testimonial evidence violative of Fifth Amendment values will not be introduced.

A state law privilege to refuse testing, which provides that the exercise of the privilege is admissible in evidence, is not truly a privilege. In any event, since a refusal is not testimonial and there is no Fifth Amendment privilege to refuse testing, state law privileges simply have no bearing on the Fifth Amendment issue before the court. Further, the introduction of a refusal to take a breathalyzer test in evidence does not violate due process when the individual is not impliedly informed that he will suffer no penalty should he refuse and he does not remain silent when given an opportunity to take the test but engages in the verbal conduct of refusing.

Since the introduction of evidence which is not testimonial does not violate the privilege against self-incrimination and evidence of a refusal to take a breathalyzer test is not testimonial, the judgment of the South Dakota Supreme Court must be reversed.

III.

ARGUMENT

Amicus respectfully requests the court to consider the mode of analysis proffered in this brief. The brief is spare by design (leaving the detailed discussion of particular points to Petitioner and Respondent) in order to provide the Court a clear path to follow in a subtle area of Fifth Amendment analysis which *Amicus* feels has not been adequately delineated in the reported cases.

A. So Long as the Precise Words of the Suspect Are Not Introduced in Evidence, Introduction of a Description or Summary of a Verbal Act is the Introduction of Non-Testimonial Evidence of Conduct Which Does Not Violate the Fifth Amendment.

The Fifth Amendment is not violated when the evidence introduced is neither related to a communicative act nor used for the

testimonial content of what is said. *See United States v. Dionisio,* 410 U.S. 1 (1973); *Gilbert v. California,* 388 U.S. 263 (1967); *United States v. Wade,* 388 U.S. 218 (1967); *Schmerber v. California,* 384 U.S. 757 (1966). Many of the cases holding a refusal to take a breathalyzer test admissible despite Fifth Amendment objections have done so on the grounds that such a refusal is conduct which is not testimonial. *See Welch v. District Court,* 594 F.2d 903, 904 (2d Cir. 1979) (per curiam); *Newhouse v. Misterly,* 415 F.2d 514, 517-18 (9th Cir. 1964), *cert. denied,* 397 U.S. 966 (1970); *Hill v. State,* 366 So.2d 318, 324-25 (Ala. Sup. Ct. 1979); *Campbell v. Superior Court,* 106 Ariz. 542, 548-49, 478 P.2d 685, 692 (1971); *People v. Sudduth,* 65 Cal.2d 543, 545-46, 55 Cal.Rptr. 393, 395, 421 P.2d 401, 403 (1966), *cert. denied sub nom., Sudduth v. California,* 389 U.S. 850 (1967); *State v. Durrant,* 55 Del. 510, 514-15, 188 A.2d 526, 528 (1963); *Commonwealth v. Robinson,* 229 Pa.Super. 131, 147-49, 324 A.2d 441, 450-51 (1974).

Justice Traynor's cogent analysis of a refusal to perform a testimonial act, set forth below, has become the leading exposition of this view.

> Nor was defendant's refusal to "display his voice" itself a testimonial communication. It was circumstantial evidence of consciousness of guilt, and like similar evidence, such as escape from custody, false alibi, flight, suppression of evidence, and failure to respond to accusatory statements when not in police custody, its admission does not violate the privilege. Moreover, as in the foregoing examples, the evidence did not result from a situation contrived to produce conduct indicative of guilt.... A guilty party may prefer not to find himself in a situation where consciousness of guilt may be inferred from his conduct, but it can scarcely be contended that the police, who seek evidence from the test itself, will tend to coerce parties into refusing to take tests in order to produce this evidence.
>
> *Although conduct indicating consciousness of guilt is often described as an admission by conduct, such nomenclature should not obscure the fact that guilty conduct is*

> *not a testimonial statement of guilt. It is therefore not protected by the Fifth Amendment. By acting like a guilty person, a man does not testify to his guilt but merely exposes himself to the drawing of inferences from circumstantial evidence of his state of mind.*

People v. Ellis, 65 Cal.2d 529, 537-38, 55 Cal.Rptr. 384, 389-90, 421 P.2d 393, 397-98 (1966) (emphasis added; citations and footnotes omitted).

This perception of a refusal to take the breathalyzer test as "conduct" leaves unresolved the issue alluded to by this court in *Schmerber;* namely, a refusal often consists of words and words may be testimonial.

> Th[e] conclusion [that testimonial capacities were in no way implicated] would not necessarily govern had the State tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compultion to take the test.... *If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forego the advantage of any testimonial products of administering the test — products which would fall within the privilege.*

Schmerber v. California, supra, 384 U.S. at 765 n. 9 (1966) (emphasis added).

Amicus submits that the potential Fifth Amendment problems presented by a suspect's verbal responses when confronted with a demand that he furnish a breath sample are avoided when the refusal is viewed as a verbal act. Justice Traynor ignored (or more likely, found too obvious to mention) the fact that in most instances where physical evidence is requested, a refusal to comply with that request is communicated by means of the spoken word. As an example he gave of "conduct" — false alibi — illustrates, however, Justice Traynor was also referring to acts which consist of words or, more commonly, verbal acts.

The concept of a verbal act or words as conduct is used to explain the admission of certain out-of-court statements which would otherwise appear to violate the rule against heresay. *See, e.g., VI Wigmore on Evidence* §1766 at 177 (Chadbourne Rev. 1976). A verbal act is not offered to establish the truth of the matter stated therein for purposes of the Hearsay Rule; it is offered only to establish the fact that the verbal act took place. *Id.* at 177-78. A verbal act is, therefore, not testimonial since it makes no assertion, *id.* at 177, and it is not a statement. Weinstein & Berger, *Weinstein's Evidence* §801(a) [01] (1981 ed.). *See, e.g., Safeway Stores v. Coombs,* 273 F.2d 295, 296 (5th Cir. 1960); Fed.R.Evid. 801(a); Cal.Evid. Code §225. The trier of fact may draw an inference of guilt from conduct; however, that inference is not conclusive and the accused is free to explain his reasons for engaging in certain conduct.

Amicus submits that a refusal to take a breathalyzer test is a verbal act — conduct which consists of words — which is no more "testimonial" within the meaning of *Schmerber* and its progeny than flight in the face of a request to take a breathalyzer test. Of course, characterizing a refusal as conduct does not avoid the problems anticipated by this Court in the above-quoted footnote from *Schmerber* for that refusal must be proved.

A refusal may be proved by the introduction of testimony by the arresting officer which summarizes or describes the words used to refuse rather than by the introduction of the words actually spoken. Such testimony is nothing more than a description of a verbal act and makes no use of any arguably "testimonial" content of the refusal itself. To avoid the use of "testimonial" evidence and possible self-incrimination problems, the State must "forego the advantage of any *testimonial* products of [demanding that the individual take such a test and using his refusal to convict him if he does not]."*Schmerber v. California, supra,* 384 U.S. 765 n.9. By using descriptions of the suspect's verbal act rather than the words spoken, the state uses no testimonial communications from the accused and, accordingly, does not violate his privilege against self-incrimination as interpreted by *Schmerber* and its progeny. *See Newhouse v. Misterly, supra,* 415 F.2d at 518; *State v. Anderson,* 53 Ore.App. 246, ____, 631 P.2d 822, 824 (1981); *Commonwealth v. Robinson, supra,* 229 Pa.Super. at 149-50, 324 A.2d at 415.

Where the State attempts to introduce the actual words spoken in refusing to take a breathalyzer test, whether after *Miranda* warnings or more elaborate safeguards,[1] the State is attempting to introduce testimonial communications which are subject to an analysis far different from that employed here. The questions which would be raised are not before the court on the present record.

B. Use of a Refusal to Take a Breathalyzer Test When State Law Grants a Right to Refuse Does Not Violate Due Process When the Suspect Has Not Been Impliedly Informed That He Has a Right to Refuse Without Penalty.

Amicus wishes to comment briefly on two peripheral issues raised by the South Dakota Supreme Court -- the issue of a state law privilege to refuse to take the test and the application of *Doyle v. Ohio*, 426 U.S. 610 (1976) to the use of such a refusal.

The South Dakota Supreme Court has held that an individual suspected of drunk driving has a privilege to refuse to take a breathalyzer test. *See State v. Oswald*, 90 S.D. 342, 241 N.W. 2d 566 (1976); *State v. Buckingham*, 90 S.D. 198, 240 N.W. 2d 84 (1976). A "privilege" that is conditioned in such a way by the State that its exercise can be introduced on the issue of guilt at trial is not a privilege. *See Welch v. District Court, supra*, 594 F.2d at 905. This "privilege" is a legislative directive ordering peace officers to refrain from forcibly administering breathalyzer tests when a suspect refuses to take the test and, as such, is nothing more than an attempt to avoid conflict between the parties concerned. *See, e.g., Bush v. Bright*, 264 Cal.App.2d 788, 71 Cal.Rptr. 123 (1968). If there is no Fifth Amendment privilege to refuse to take the test (and there is not because refusing to take the test is not testimonial), the *Fifth Amendment* is not violated when evidence of refusal is introduced regardless of any state-created right to refuse, however characterized. *See Welch v. District Court, supra*, 594 F.2d at 905; *Commonwealth v. Robinson, supra*, 229 Pa.Super. at 149, 324 A.2d at 451. Use of the refusal to take the test does not violate due process and the reliance of the court below on *Doyle v. Ohio*, 426 U.S. 610 (1976), is, therefore, misplaced.

[1] *Cf. People v. Ellis, supra*, 65 Cal.2d at 539, 55 Cal.Rptr. at 390-91, 421 P.2d at 389-99 (suspect who has been given *Miranda* warnings must also be informed that his right to remain silent does not include a right to refuse voice exemplars before they can be used against him).

When a person taken into custody is informed that he has a right to remain silent as required by *Miranda v. Arizona*, 384 U.S. 436 (1966), "every post-arrest silence is insolubly ambiguous. . . ." (*Doyle v. Ohio, supra*, 426 U.S. at 617) and use of that silence to impeach his credibility violates due process. The rule in *Doyle* was spawned by the fundamental unfairness of impliedly informing an individual that he could remain silent without penalty and then proceeding to use that silence to discredit his version of events. *See Fletcher v. Weir*, ____ U.S. ____, ____, 102 S. Ct. 1309, 1312 (1982); *Anderson v. Charles*, 447 U.S. 404, 407-408 (1980); *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980); *Roberts v. United States*, 445 U.S. 552, 561 (1980). In the present case, although Respondent was given *Miranda* warnings, he was not informed that he could refuse to take the breathalyzer test; rather, he was told that he would lose his license if he did not, and he did not remain silent.

The lack of a specific warning from which Respondent could infer that he would not be penalized for his refusal to take the breathalyzer test removes the glaring unfairness that motivated this Court's decision in *Doyle*. Assuming *Doyle* applies to any situation where an individual is impliedly assured that his exercise of a privilege will have no collateral consequences, it plainly does not apply here. Further, Respondent was not impeached by his silence for he did not remain silent — he refused to take the breathalyzer test. The officer's description of this verbal act was introduced at trial. Respondent was free to explain his refusal to submit to the test and, in the absence of any explanation, the finder of fact was free to draw any inference it wished from his refusal.

CONCLUSION

The Fifth Amendment privilege against self-incrimination is not violated by introduction of evidence which is not testimonial. A refusal to take a breathalyzer test is conduct — a verbal act — which is not testimonial; the use of such a refusal cannot violate the Fifth Amendment so long as the precise words uttered are not introduced in evidence. A right created by state law to refuse a breathalyzer test does not affect this Fifth Amendment analysis. Finally, *Doyle v. Ohio* has no application where, as here, an individual has not been impliedly informed that his conduct will not be used against him and has not remained silent. The judgment of the South Dakota Supreme Court should be reversed.

DATED: July 21, 1982

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June 30, 1982

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RE: South Dakota v. Neville, No. 81-1453

Dear Mr. Kirby:

As the attorney for the State of South Dakota in the above-entitled appeal, I consent to the filing of an amicus curiae brief in the above-entitled appeal by the Mothers Against Drunk Drivers, by and through their attorneys, Hansen, Boyd, Culhane and Mounier, Sacramento, California. This letter is intended only as consent to filing of the brief as amicus curiae by the above-named group.

Sincerely,

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June 10, 1982

James Kirby
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Re: State of South Dakota vs. Neville

Dear Mr. Kirby:

This is in response to your telephonic contact relating to your filing an amicus curiae brief on behalf of your client in the above referred to US Supreme Court Case. This letter can serve as our consent to such a filing.

On an unrelated matter, I am presently President of the South Dakota Trial Lawyers Association. For a number of years we have been discussing the possibility of making a bona fide effort to get a dram shop act through the South Dakota Legislature. At the present time, South Dakota does not have a dram shop act, and the South Dakota Supreme Court has held that there is no common law cause of action in the State of South Dakota; however, we presently have a case in front of the Court attempting to get them to reverse their decision.

If we do determine to attempt, during the next legislative session, to get a dram shop act through, we anticipate that it will become somewhat of an expensive lobbying effort since the liquor lobby in South Dakota is quite strong.

I would appreciate your furnishing me with the names of individuals within your organization that I, or other officers of the South Dakota Trial Lawyers Association, could contact to pursue the possibility of securing their assistance in such a legislative attempt. It would appear that such legislation is the type of legislation that they would be most interested in supporting.

Your cooperation in furnishing this information will be appreciated.

Sincerely yours,

ARNESON, ISENBOTH AND GIENAPP

By
David R. Gienapp

DRG/wk

Amicus Brief

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Office - Supreme Court, U.S.
FILED
JUL 22 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF SOUTH DAKOTA, PETITIONER

V.

MASON HENRY NEVILLE, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF OF AMICI CURIAE, TEXAS DISTRICT & COUNTY ATTORNEYS ASSOCIATION AND SOUTH DAKOTA STATE'S ATTORNEYS ASSOCIATION, URGING REVERSAL

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III. IF ANY FIFTH AMENDMENT INTERESTS ARE INVADED HERE (THOUGH AMICI CONTEND NONE ARE), THEY ARE "INSUFFICIENTLY SUBSTANTIAL" UNDER THE ANALYSIS OF CALIFORNIA V. BYERS TO OVERCOME THE "STRONG POLICIES IN FAVOR OF DISCLOSURE." 19

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NO. 81-1453

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

STATE OF SOUTH DAKOTA, PETITIONER

V.

MASON HENRY NEVILLE, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF SOUTH DAKOTA

BRIEF OF AMICI CURIAE, TEXAS DISTRICT & COUNTY ATTORNEYS ASSOCIATION AND SOUTH DAKOTA STATE'S ATTORNEYS ASSOCIATION

INTEREST OF AMICI CURIAE

The Texas District and County Attorneys Association ("TDCAA") is a nonprofit association with more than 1,000 members, consisting of elected district and county attorneys and their assistants in Texas. Its bylaws provide that its goal is to "promote the improvement of prosecution in Texas."[1] The South Dakota State's Attorneys Association performs similar kinds of functions in that State.

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1 To that end, TDCAA conducts frequent continuing education programs, publishes books and manuals, and cooperates with various agencies of the State (for example, it has statutory authority to appoint five members of a state agency called the Texas Prosecutors' Council). It also takes public positions, as amicus curiae and otherwise, on criminal justice issues.

The members of TDCAA and SDSAA have a particular interest in this case because they are responsible for representation of the State in driving-while-intoxicated cases.[2] Experience shows them that jurors are acutely aware of the existence of chemical tests. Jury members know that such tests are routinely administered to arrested drivers, and they expect to hear evidence of test results. When they are deprived of an explanation for its absence, jurors commonly assume that test results were unfavorable to the State. Exclusion thus results in the presentation of a misleading impression to the jury and severely hampers evenhanded prosecution of this much underestimated crime.

SUMMARY OF ARGUMENT

I.

Under the implied consent laws of most States, a driver consents to testing by the act of driving on the State's roads. Such laws have been repeatedly upheld as constitutional, and the increased death toll on the highways indicates that they are needed more today than ever before. The driver who subsequently refuses breaks his agreement and engages in a wrongful act that does not qualify for fifth amendment protection.

This analysis holds true in South Dakota as well, despite dictum about a State-recognized "right" of refusal. The treatment of the refusal in South Dakota indicates that it is not a right at all. Most States do not forcibly test a driver who refuses, but that is merely a reflection of distaste for violence between police and inebriated drivers and does not reflect a fifth amendment right. Furthermore, it is not the office of the fifth amendment to advance state-created rights by evidence exclusion, even assuming one were to exist here.

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2 Texas is among the minority of States that exclude evidence of refusal. Dudley v. State, 548 S.W.2d 706 (Tex. Crim. App. 1977).

II.

Exclusion of this evidence would not serve the purposes underlying the fifth amendment. The refusal is nontestimonial. The major reason for introduction of the evidence is to avoid the misrepresentation, confusion, and prejudice to the State that results from the jury's speculation about the absence of the test. Furthermore, even to the extent that it shows consciousness of guilt, the refusal amounts to intentional destruction of evidence and is nontestimonial.

The State does not ask the defendant to "convict himself out of his own mouth." All it asks is that he remain passive while a blood sample is analyzed by the State's own "independent labors." A refusal is the withholding of a prior agreement to refrain from violent physical resistance, and such conduct is not protected by the fifth amendment.

III.

To the extent fifth amendment interests are involved (though amicus believes they are not), they are insufficiently "substantial" in light of California v. Byers, 402 U.S. 424 (1971), to overcome the "strong policies in favor of disclosure" underlying the implied consent law.

ARGUMENT

I. THERE IS NO FEDERALLY PROTECTED "RIGHT" TO VIOLATE THE IMPLIED CONSENT LAW BY RESISTANCE TO CHEMICAL TESTING.

Under the implied consent laws of most States, an intoxicated driver gives irrevocable consent to chemical testing by the act of using the State's public roads. South Dakota's law, for example, provides that such a person "shall be deemed to have given his consent." S.D.C.L. 32-33-10. The consent thus given would be meaningless if it were revocable at the option of an

intoxicated driver on arrest. Such laws are constitutional and are needed today more than ever.

A. *Enforcement of implied consent laws is increasingly necessary as the "slaughter on the highways . . . reaches the astounding numbers heard only on the battlefield" [Breithaupt v. Abram, 352 U.S. 432 (1957)].*

Nearly fifteen years ago, Justice Brennan wrote that intoxication was "one of the great causes of the mortal hazards of the road." Breithaupt v. Abram, 352 U.S. 432, 439 (1957). "The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures heard only on the battlefield." Id. These indicia of the strength of the State's concern [3] were a factor in overcoming the defendant's fifth amendment attack on an implied consent statute in that case.

More recently, in Mackey v. Montrym, 443 U.S. 1 (1979), the Court upheld a draconian[4] implied consent law and relied heavily upon accident statistics. The Court pointed out that more were killed annually in a single State by drunken drivers than by "the tragic DC-10 crash at O'Hare Airport" that same year. Traffic deaths, the Court further observed, "exceed 50,000 annually," and "approximately half of these fatalities are alcohol-related." Id. at 19. These facts led the Court to emphasize the "acute safety hazard" posed by drunken drivers. Because of that hazard, "a State plainly has the right to offer incentives for taking a test." Id.

Today, the astounding figures heard on the battlefield are dwarfed by the more astounding figures heard from the highway.

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3 The strength of the "policy in favor of disclosure" is a proper concern in deciding fifth amendment claims under California v. Byers, infra. See section III of this brief.

4 The statute provided for license suspension before a hearing on the suspension was held.

During the Vietnam War, more than six times as many American civilians were killed by drunk drivers as there were American soldiers killed on the battlefield.[5] As one spokesperson has put it, "We are talking about a crime that kills more than homicides, that injures more people and more seriously than assaults with deadly weapons, that does more property damage than forgers, burglars and robbers all added together."[6]

More than 26,000 persons die each year as a result of intoxicated drivers. That is more than half of all traffic fatalities. In addition, more than 750,000 persons are seriously injured each year in drunk-driving collisions. Congressman James V. Hansen has testified that his former work for an insurance company showed that almost seventy (70) per cent of fatal accident claims involved drinking drivers.[7] The military provides another surprising figure: the leading cause of death of American soldiers under 40 years of age is collisions with drunk drivers.[8]

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5 Hearings before the Senate Subcommittee on Courts of the Committee on the Judiciary, Oversight into the Administration of State and Local Court Adjudication of Driving While Intoxicated, 97th Cong., 1st Sess. 93 (1981) [Hereinafter cited as "Senate DWI Hearings"]. I believe Senator Dole referred earlier to the Vietnam War, where 45,000 soldiers were killed by the enemy. In the same period of time, 274,000 Americans died on the highway as a direct consequence of alcohol intoxication.
Id.

6 Mothers Against Drunk Drivers, Houston Area Chapter Newsletter, vol. 1, p. 1 (1982).

7 Senate DWI Hearings at 3-4, 12, 14.

8 Houston Chronicle, June 20, 1981, sec. 1, p. 17, col. 1. 63 per cent of all deaths of military personnel 25 or younger were caused by intoxicated drivers. These soldiers' deaths, in 1981 alone, cost taxpayers $150 million for medical, disability and insurance payments, not including the $10,000 cost to recruit and train a replacement for each deceased soldier. The problem is so serious that the Acting Assistant Secretary for Defense has proposed that soldiers convicted of the offense be required to affix orange bumper stickers to their cars, reading "convicted of Drunk Driving." Id.

Furthermore, the offense and the harm associated with it are steadily increasing today, even in areas in which other crimes are decreasing. [9] The most effective means of reversing this trend is statutory reform reflecting the gravity of the offense, coupled with vigorous prosecution.[10] Paradoxically, however, the percentage of offenders who are apprehended, convicted and sentenced is surprisingly small in comparison to other offenses. [11] The probable reason is that the offense has been difficult to prosecute successfully even during the frequent times in the past when public awareness has been aroused. [12] Arrest procedures for intoxicated driving are more cumbersome than for any similar offense. [13] But the most likely cause of the small number of pro-

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9 See, e.g., Senate DWI Hearings 71. In the Houston area, "major" crimes (murder, rape, robbery etc.) decreased 2.9 per cent at the same time that DWI increased. Houston Chronicle, June 17, 1982, sec. 1, p. 1, col. 1; Id. June 20, 1982, sec. 1, p. 2A, col. 1.

10 Owing to passage of a stringent series of laws and vigorous enforcement, California has reported 100 fewer alcohol-related deaths this year than last. National Law Journal, Mar. 22, 1982, p. 22 col. 2. California's law provides severe sentences, restricts plea bargaining, makes 0.10 blood alcohol per se illegal, and punishes refusal–which is admissible in evidence.

11 Senate DWI Hearings 14, 48.

12 See H. Kalven & H. Zeisel, The American Jury (1966). Kalven and Zeisel persuasively show that public concern is not merely a recent phenomenon.

13 It takes up to 4 hours for the arresting officer to "process" a DWI arrestee. This factor discourages DWI arrests. Senate DWI hearings 50.

secutions is projection of public tolerance of the offense.[14] This atmosphere of tolerance is aggravated by such actions as protecting the intoxicated driver's wrongful refusal of a chemical test to which, by law, he is deemed already to have signified his consent.

This Court has consistently stressed the highway death toll in deciding constitutional cases involving drunk drivers. See, e.g., Breithaupt, supra; Mackey v. Montrym, supra. During Senate Hearings on the subject, however, the most convincing indicia were not statistics but the accounts, by virtually every Senator or Congressman who testified, of the human tragedies they or their families had personally experienced at the hands of drunken drivers.[15] These dismal numbers, the resulting human impact, and the intractability of the problem all show that implied consent laws are not a relic of the past but essential tools of the law that are needed now more than ever before.

B. *The refusal is wrongful and does not merit constitutional protection.*

(1) The law properly and constitutionally infers an irrevocable consent by the driver's acceptance of the privilege of driving on public roads, from which he may lawfully be excluded.

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14 Senators and Congressmen repeatedly expressed surprise at public tolerance in view of the magnitude of the death toll. See, e.g., Senate DWI Hearings 3 (Sen. Dole), 7 (Sen. Pell). "I have long been amazed that a society which expresses shock and outrage over 20,000 homicides annually continues to accept, year after year, an even greater number of deaths at the hands of drunk drivers. This complacency is hard to understand when one realizes that a car with an intoxicated driver is precisely as dangerous as a loaded gun in the hands of someone who is blinded by rage." Id.

15 See e.g., Senate DWI Hearings 4 (Sen. Heflin); 8 (Sen. Pell); 12 (Cong. Hansen).

States exclude from driving those who do not carry insurance, those who have excessive traffic convictions, those who have not been licensed, and other categories of persons. The implied consent law is based on a legislatively expressed social consensus that one who will not signify agreement in advance to consent to a blood test ought to be excluded from the highways as well.

Such an implied consent is constitutional. In Hess v. Pawloski, 274 U.S. 352 (1927), a similar implied consent law inferred irrevocable appointment of a State officer as agent for service of process on a nonresident driver from his "acceptance . . . of the rights and privileges [of] operating a motor vehicle . . . on a public way in the commonwealth." The State's right to "regulate the use of its highways" included the power to exclude the driver unless he gave consent in advance. "And," said the Court, "having the power so to exclude, the State may declare that the use of the highway . . . is the equivalent" of consent.

In Breithaupt v. Abram, 352 U.S. 432 (1957), the Court expressly approved an implied consent law similar to that in Hess, inferring acquiescence to chemical intoxication testing. "In fact," wrote Justice Brennan for the Court, "any person who operates a motor vehicle on the highways of that State [is] deemed to have given his consent to submit to a chemical test . . ." Id. at 410 n. 2. Finally, in Schmerber v. California, 384 U.S. 757 (1966), the Court cited Breithaupt and upheld the taking of a chemical sample "despite his [the driver's] refusal, on the advice of his counsel, to consent to the test." Accord, Mackey v. Montrym, supra.

(2) A driver who refuses testing after implied consent breaks the agreement he has made to gain access to the road, and he acts wrongfully.

The first significant case after Schmerber v. California, supra, to consider the refusal of an impliedly consenting driver to submit to chemical testing was People v. Sudduth, 65 Cal.2d 543, 421 P.2d 401, 55 Cal. Rptr. 393 (1966). In that case, Chief Justice Traynor described the defendant's conduct as "wrongful":

> A wrongful refusal to cooperate with law enforcement officers does not qualify for [constitutional] protection. A refusal that might operate to suppress evidence of intoxication, which disappears rapidly with the passage of time, should not be encouraged . . . .

421 P.2d at 403, 55 Cal. Rptr. at 395.

"Numerous other courts soon followed this reasoning. At least five had reached the conclusion of Schmerber and Sudduth years earlier." Cohen, The Case for Admitting Evidence of Refusal to Take a Breath Test, 6 TEXAS TECH L. REV. 927, 929 (1975). Such cases proceed on the theory that the refusal is wrongful,[16] that the consent to extraction of the sample is actually given by the act of driving, and that no lawful choice is available to the driver at the time of testing. The Constitution does not authorize one to renege on such a commitment any more than it authorizes the resulting violation of law.

> (3) Statutory recognition of the driver's physical ability to breach his implied consent is merely a reflection of legislative distaste for the violence that would follow from the use of force upon the "recalcitrant inebriates."

The chemical testing statutes generally reflect the assumption that if the driver wrongfully breaks his implied consent, chemical testing is not feasible. However, this statutory recognition of the driver's de facto physical ability to destroy evidence does not create a constitutional right. The driver merely has the raw physical power to do a wrongful act, which is not the same

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16 There are some aberrational statutes that create an unqualified right of refusal. For an analysis, see Cohen, supra, 6 TEXAS TECH L. REV. 941-45. South Dakota is not among those States, because its legislation punishes the refusal by license suspension and makes it expressly admissible in evidence.

as a "right." Thus, for example, in Bush v. Bright, 264 Cal. App. 2d 788, 71 Cal. Rptr. 123 (1968), the court held:

> It is firmly established that Bush has no right to resist or refuse such a test [citing Schmerber v. California]. It is simply because such a person has the physical power to make the test impractical and dangerous to himself and those charged with administering it, that it is excused upon an indication of his unwillingness.

The Court concluded:

> The obvious reason for acquiescence in the refusal of such a test by a person who as a matter of law is "deemed to have given his consent" is to avoid the violence which would often attend forcible tests upon recalcitrant inebriates.

71 Cal. Rptr. at 124-25 (emphasis in original).[17]

C. *Despite dicta to the contrary, the refusal is wrongful in South Dakota.*

(1) Consent is implied in South Dakota, and there is no true "right" to refuse; the refusal is punished.

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17 See also Welch v. Superior Court, 594 F.2d 903, 905 (2d Cir. 1979) ("[Toierance of refusal] is merely an explicit recognition of the practical existence of situations that might develop where a driver simply will not cooperate even though required to by state law, such as resort by the police to force in an effort to obtain the physical evidence to which they are entitled"); Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971) (following Bush v. Bright); State v. Miller, 275 S.C. 213, 185 S.E.2d 359 (1971) ("appellant argues that by the terms of [the implied consent law] he had a statutory right to refuse . . . . We do not so construe the statute, which simply opts against forcible testing"); Cohen, supra, 6 TEXAS TECH L. REV. at 932-33.

South Dakota cases contain dicta implying the existence of a "right" to refuse. However, the decisions make it clear that this "right" is a creature of semantics.

South Dakota provides for automatic driver's license suspension on refusal. The suspension is punishment for the exercise of the putative "right" and is the best indication that it is not a right at all. Furthermore, the statute provides for a warning that the adverse consequence of license suspension flows automatically from exercise of the "right." The purpose of this warning is to deter the driver from refusal. The statute also provides that the driver "shall be deemed" to have given consent. This provision would be rendered meaningless by a construction affording the driver an unfettered right to refuse consent. Finally, the statute expressly provides for admittance of evidence of refusal.

If South Dakota can provide for an administrative sanction such as license suspension as a deterrent to exercise of the putative "right" of refusal, there is no logical reason why it cannot also provide for admittance of the refusal into evidence.

Furthermore, the grant of a limited or qualified "right" to refuse, even if it exists, does not negate the State's power to provide "an incentive to take the test," because the State "is not required to take an 'all-or-nothing' approach to the acute safety hazards posed by drunken drivers." Mackey v. Montrym, 443 U.S. 1, 19 (1979). Another federal court, faced wth a similar situation in which there was an asserted "right" under State law to refuse (but the refusal, as here, was expressly made admissible and subjected the driver to license suspension), upheld admittance of the refusal into evidence, saying the following:

> Whatever may be the merit of such a distinction where the State grants by statute an unqualified right to refuse to submit to a breath test (or other physical evidence extraction procedure), it has no weight where, as here, the statutory right to refuse is expressly conditioned on the State's correlative right to introduce evidence of that refusal at trial.

Welch v. Superior Court, 594 F.2d 903, 905 (2d Cir. 1982). If there is truly an underlying "right" to refuse, it is violated by South Dakota's retributive license suspension just as surely as it is by South Dakota's express statutory admittance of the refusal at trial. Garrity v. New Jersey, 385 U.S. 493 (1967). Such a result would contradict the holdings of both the South Dakota Supreme Court and this honorable Court, which has upheld such suspensions as constitutional. Mackey v. Montrym, 443 U.S. 1 (1979).

(2) The fifth amendment does not protect choices created under State law in any event.

The fifth amendment is not an all-purpose command to the States to exclude admissible evidence on federal grounds merely because exclusion arguably furthers some State-created right or privilege, even assuming one exists here. There are thousands of State-created rights, and it is not the office of the fifth amendment to protect all of them by exclusion of evidence. This is particularly so when the same State legislature that has created the putative right has also expressly provided that evidence of refusal is admissible.

II. THE PURPOSES UNDERLYING THE FIFTH AMENDMENT WOULD NOT BE SERVED BY EXCLUSION OF THIS EVIDENCE.

A. *The evidence is nontestimonial because its main use is to avoid the confusion, misrepresentation, and prejudice to the State that would result from a failure to explain the absence of test results to the jury.*

Jurors are well nigh universally aware of the availability of chemical tests. They can hardly escape inferring either that a test was not offered, or that it was favorable to the defendant, if there is no test and no explanation. The doubt created by unexplained absence of chemical test results is often enough by itself to ensure an irrational acquittal. This phenomenon, which is "familiar to prosecutors, defense attorneys and judges," constitutes "a serious problem for the State." Cohen, supra, 6 TEXAS

TECH L. REV. at 945.

Admittance of the evidence for this purpose does not make the accused a "witness against himself" within the meaning of the fifth amendment. It is a general principle of evidence that either side is permitted to explain the absence of evidence that jurors would normally expect to be present. This purpose has been repeatedly recognized by State court opinions as a major reason for admitting the refusal into evidence. For example, in State v. Andrews, 297 Minn. 260, 212 N.W. 863, 867 (1973), the dissenters explained their reasons thus:

> The concept of the implied consent law had by 1971 been more widely accepted than at the time of its first enactment, with increased public awareness of its routine use. This being so, the legislature (in repealing a statutory provision making evidence of refusal inadmissible) could well have intended to avoid a jury's speculating that a chemical test had been given to the defendant but that the absence of any evidence concerning the result indicated that the results were negative.

Another court, writing in State v. Lynch, 274 A.2d 443 (Del. Super. Ct. 1971), reasoned as follows:

> Even if it were thought desirable to keep out evidence of a refusal to take a sobriety test, it would be difficult to isolate the test refusal from the other admissible circumstances without distorting the whole truth; it should be told as it was.

Admittance of evidence for this function does not constitute the accused as a "witness." It is nontestimonial. It is admitted for the purpose of avoiding the confusion, misrepresentation, and prejudice to the State that would otherwise unavoidably result. See Cohen, supra, 6 TEXAS TECH L. REV. at 945-46.

Exclusion of the refusal evidence has a number of unfortunate side effects. It amounts to fooling the jury. Every prosecutor who has tried many intoxicated driving cases has experienced the frustration of citizens who have acquitted a defendant they believed guilty after agonizing over the significance of the absence of test results, only to be told that there was no significance except that the defendant refused the test. Thus, exclusion decreases public respect for courts and for the law. At the same time, exclusion of the evidence means a windfall benefit to those who break their implied consent, while those who furnish a breath sample are disadvantaged for having complied with the law.

The South Dakota Supreme Court disregarded all of these considerations. It reasoned that evidence of refusal "is relevant only because it infers that a defendant refused to take the blood test because of his fear as to whether he would pass it." State v. Neville, ____ N.W.2d ____ (S.D. 1981), Appendix A-8. That reasoning is demonstrably erroneous. The purpose of explaining the absence of test results furnishes a separate and more important basis for the evidence.[18]

B. *Even if it is offered to show consciousness of guilt, the evidence is nontestimonial, because it is in the category of flight, destruction of evidence, or false alibi.*

It is expected that the State of South Dakota will thoroughly argue the case law showing that the evidence in question

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18 Several courts have used jury instructions telling the jury that the refusal cannot be taken as showing consciousness of guilt, but is admitted only to explain the absence of test results. For example, in Minnehaha County, South Dakota, jurors have been instructed that the refusal "should not be taken by you as an admission that said defendant was under the influence of an intoxicating beverage." Letter from Deputy State's Attorney Marten A. Trotzig to Assistant Attorney General Mark Smith, June 8, 1982. A similar instruction has been used in Iowa. State v. Holt, 156 N.W.2d 844 (Iowa 1968). These instructions belie the conclusion of the South Dakota court that consciousness of guilt is the only relevance of the refusal.

is nontestimonial. Amicus curiae adopts the analysis of the State in this regard, and Amicus' purpose, here, is to add considerations not furnished by the State.

Under the Federal Rules of Evidence, the refusal is nonassertive conduct. Even if used to show a consciousness of guilt, the Federal Rules treat it as not constituting an assertion, and it is admissible notwithstanding the hearsay rule. Fed. R. Ev. 801 (a). The adoption of the Federal Rules is a recognition by this Court and by the Congress that such conduct, even if used to show consciousness of guilt, is not testimonial.

(1) The refusal is the intentional destruction of evidence.

As one commentator has written, the refusal "closely resembles . . . flight, escape, or destruction of evidence." Cohen, supra, 6 TEXAS TECH L. REV. at 944. In fact, the refusal literally is the intentional destruction of evidence and should be treated as such.

When an intoxicated driver is asked to submit to a blood test, all he is being asked to do is to remain passive while a blood sample is taken. The prosecution needs no assistance. It does not call on the accused to "convict himself out of his own mouth." Indeed, all it requires of him is that he refrain from violent physical resistance to the routine procedure of drawing blood, which, as Justice Brennan pointed out in Breithaupt v. Abram, supra, is a commonplace, acceptable process encountered frequently in life by virtually everyone. The search for evidence is undertaken solely by the government, by its own "independent labors." A refusal to avoid physical resistance is not protected by the fifth amendment.[19]

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19 Breath and urine samples require a slightly greater degree of physical cooperation. Nevertheless, all that is asked is that the driver not refrain from normal bodily functions in connection with test procedure. Furthermore, the driver is usually afforded a choice of blood, breath or urine tests, and may opt for the latter to avoid drawing of blood.

Indeed, Briethaupt v. Abram shows dramatically that all that is expected of the accused is avoidance of physical resistance. In Breithaupt, the accused was actually unconscious at the time the sample was taken. The prosecution did not need for him to be conscious, or to say anything, in order for it to obtain the evidence to which it was entitled; he could be, and was, passive.

Furthermore, the intoxicated driver who refuses such a test does so in the knowledge and with the intent that his own body will metabolize the most vital evidence bearing on guilt or innocence before trial. The only reason the refusal is useful to the accused is due precisely to this destruction of evidence by the driver's own body. Again, such an interest does not qualify for fifth amendment protection.

(2) Exclusion of the refusal would create anomalous results in cases in which an accused refuses to give a handwriting sample, voice exemplar, lineup appearance or similar evidence. Such refusals are admissible in evidence.

Exclusion of such evidence would create anomalous results in the event an accused withholds other types of physical evidence. For example, what should be done if a defendant refuses to give a handwriting sample? The sample itself is nontestimonial and there is no right to withhold it. In United States v. Nix, 465 F.2d 90 (5th Cir. 1972), the trial court permitted government counsel to present evidence of a defendant's refusal to furnish a handwriting sample and to comment in final argument on the refusal. The Court of Appeals upheld the conviction, concluding that there was no fifth amendment violation. Accord, United States v. Wolfish, 525 F.2d 457, 461 (2d Cir. 1975). Any other result would reward lawbreaking, particularly since the contempt sanction is an ineffective deterrent to a guilty defendant facing a substantial sentence in the event of conviction.

Furthermore, the same reasoning extends to refusal to submit other types of nontestimonial evidence, as the following indicates:

> . . . [T]he attorney's duty to his client is not limited to an intellectually honest search for truth; traditionally, even the guilty are entitled to the assistance of counsel. Whether such assistance should extend to obstructionist efforts in the stationhouse is a nice question; as a practical matter, it is a possibility . . . .
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> . . . To take an obvious example, . . . a voice identification test . . . does not violate the accused's privilege against self-incrimination. Presumably, then, the accused has the obligation to participate. What consequences should follow if his lawyer advises him to stay completely silent? Can the lawyer be punished for contempt . . . ? What if his client has by then realized that perhaps staying silent is a good tactic, even if his counsel changes his advice under court encouragement?

Comment, Lawyers and Lineups, 77 YALE L. J. 390, 396-97 (1967).

Other kinds of anomalies would result from such a holding. At least one court has gone so far as to hold that there is a right to counsel in order to assist the defendant in deciding whether to exercise his right to refuse testing. Heles v. South Dakota, 50 U.S.L.W. 2455 (D.S.D. 1982) (currently on appeal). The dilemma that exclusion of the refusal poses for ethical defense counsel is another anomaly. Loyalty to his client may tempt him to advise destruction of evidence by refusal if the refusal is protected (indeed, such advice is common). It is submitted that these logical extensions of the holding below are inconsistent with the fundamental premise underlying implied consent laws.

C. *Chemical testing does not result in the conviction of a defendant "out of his own mouth." Nor does it place him in the position of having to choose between contempt, self-incriminatory testimony, or perjury.*

The purposes underlying the fifth amendment are essentially to require the government to shoulder the entire burden of proof and to avoid the necessity of the defendant's convicting himself out of his own mouth. These purposes were set forth in Miranda v. Arizona, 384 U.S. 486 (1966), as follows:

> [O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.

When the government undertakes to obtain a blood sample, it is using its own labors, not the "cruel, simple expedient of compelling [a confession]." The equipment it uses is expensive. Its personnel who attend that equipment must be experts. The accused need only avoid engaging in violent physical resistance.

Another way of looking at the fifth amendment is that it is a safeguard against individuals being placed in the position of choosing between contempt, self-incriminatory testimony, or perjury. Neither admittance into evidence of a blood test nor admittance of a refusal violates this purpose. Neither is testimonial.

The South Dakota Supreme Court was unwilling to distinguish between testimonial statements accompanying the refusal and the refusal itself. In the case at bar, the accused stated, "I'm too drunk; I won't pass the test." This communicative statement is to be tested by other considerations under the fifth amendment, and if it was the product of psychological coercion attendant to custodial interrogation, it should be inadmissible. But the refusal can be entered into evidence with no reference to the accused's communications, by describing only his acts. "Did the defendant submit to a blood test?" would be a way of inquiring before the jury about the defendant's actions. If one were insistent upon avoiding any semblance of communicative content in the refusal, one might insist that police officers actually approach the accused to obtain a blood sample and, then, report in court

only on his physical resistance. This approach would eliminate any concern over such statements as, "I'm too drunk; I won't pass the test." It is only the distaste for violence that causes State governments to opt against insisting on attempts to sample from a resistant inebriate, and since the refusal is equally non-testimonial in either event, it would make no sense to disallow introduction of the evidence by the statement that the defendant refused.

III. IF ANY FIFTH AMENDMENT INTERESTS ARE INVADED HERE (THOUGH AMICI CONTEND NONE ARE), THEY ARE "INSUFFICIENTLY SUBSTANTIAL" UNDER THE ANALYSIS OF CALIFORNIA V. BYERS TO OVERCOME THE "STRONG POLICIES IN FAVOR OF DISCLOSURE."

In California v. Byers, 402 U.S. 424 (1971), this Court upheld requirements that a driver involved in an accident stop and give information. There was thus created the possibility that a driver guilty of a driving offense might supply a "link in the chain" of proof, namely his identity. The Court refused to hold such a requirement unconstitutional. The plurality opinion implicitly balanced[20] the self-incriminatory aspect of such disclosure, which it considered insufficiently "substantial," against the "strong policies in favor of such disclosure."

In this case, what is at issue is non-assertive conduct of the accused. Under the Byers analysis, the hazards of self-incrimination are too insubstantial to overcome the very real, legitimate benefits of enforcement of intoxicated driving laws.

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20 The fifth vote was that of Justice Harlan, who, in his concurrence, was more explicit in adopting a balancing analysis. He considered that the "constitutional values protected by the 'accusatorial' system" did not compel "substantial sacrifices in the efficient pursuit of other governmental objectives in all situations."

CONCLUSION

The judgment of the South Dakota Supreme Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have, in accordance with Rules 28.2-28.3 of this Court, served three copies hereof upon each counsel of record herein for a separately represented party, by depositing such copies, postage prepaid, in a United States Post Office, addressed to: Mark Smith, Assistant Attorney General, Pierre, S.D. 57501, and David R. Gienapp, Box 28, Madison, S.D. 57042.

Docket Sheet

NO. 81-1453-CSY	TITLE South Dakota, Petitioner v. Mason Henry Neville

DOCKETED	COURT
February 1, 1982	Supreme Court of South Dakota

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Mark V. Meierhenry
	Counsel for Respondent:
February 1, 1982	Petition for writ of certiorari filed. (Record filed).
Mar. 10, 1982	DISTRIBUTED. 3-26. (Stricken)
March 24, 1982	Response requested.
Apr. 26, 1982	Motion of respondent for leave to proceed in forma pauperis, and brief in opposition filed.
Apr. 28, 1982	DISTRIBUTED. 5-13.
May 17, 1982	The motion of respondent for leave to proceed in forma pauperis is GRANTED. Petition GRANTED.
	- ----------
June 18, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until July 21, 1982.
July 22, 1982	Brief, amicus curiae, of Mothers Against Drunk Drivers filed in support of petitioner.
July 22, 1982	Brief, amicus curiae, by The State of Indiana, joined by Alabama, Alaska, et al. in support of petition filed.
July 22, 1982	Brief, amici curiae, of Texas District & County Attorneys Association, et al. filed.
July 23, 1982	Joint appendix filed.
July 23, 1982	Brief for the petitioner filed.
July 30, 1982	Order extending time to file the respondent's brief on the merits until Aug. 30, 1982.
Aug. 30, 1982	Brief of respondent filed.
Sept. 15, 1982	CIRCULATED.
Nov. 30, 1982	Reply brief for the petitioner filed. (D).
Dec. 8, 1982	ARGUED.